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In the Supreme Court of the United States

OCTOBER TERM, 1983

JACK WALTERS & SONS CORPORATION,

Petitioner,

vs.

MORTON BUILDINGS, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

STEVEN E. KEANE
DAVID E. BECKWITH
JOHN S. SKILTON
FOLEY & LARDNER
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
(414) 271-2400
Attorneys for Petitioner

Of Counsel:
MICHAEL G. LASKIS
MICHAEL A. BOWEN
DENNIS A. HENIGAN

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

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QUESTIONS PRESENTED FOR REVIEW

1. Is a franchisor's tie of the use of its trademark to the purchase of common construction materials used in its franchisees' manufacture of a trademarked building lawful under Section 1 of the Sherman Act if the trademark covers the finished building constructed by the franchisee, and the franchisor does not separately license its mark?

2. Is vertical price-fixing lawful under Section 1 of the Sherman Act if used by a franchisor to force its franchisees' adherence to maximum retail prices advertised directly by the franchisor to ultimate consumers?

3. Was the damage suffered by petitioner as a result of respondent's alleged price-fixing antitrust injury?

4. Where a franchisor has, in concert with third parties, imposed a regime of vertical restraints on its independent dealers, for the purpose and with the effect of eliminating the dealers as actual and potential competitors of the franchisor, is the aggregation of restraints reasonable for Section 1 purposes if the individual restraints considered in isolation are lawful?

TABLE OF CONTENTS

	PAGE
Questions Presented for Review	i
Table of Authorities	iii
Opinion Below	1
Grounds for Supreme Court Jurisdiction	2
Pertinent Statute	2
Statement of the Case	2
Procedural Posture	2
Pertinent Facts	4
Reasons for Granting Review	8
I. The Court Of Appeals' Decision Disregards The Approach To Analysis Of Tying Issues Prescribed By This Court In *Jefferson Parish Hospital*	10
II. The Court Of Appeals' Rejection Of Walters' Resale Price-Fixing Claim Reflects The Same Doctrinal Reductionism As Its Rejection Of Walters' Tying Claim Does	17
III. The Court Of Appeals Likewise Erred In Rejecting Walters' Aggregation Of Restraints Claim	19
Conclusion	22

TABLE OF AUTHORITIES

Cases

PAGE

Albrecht v. Herald Company, 390 U.S. 145 (1968) 17, 19

California Glazed Products, Inc. v. The Burns & Russell Company of Baltimore City, 708 F.2d 1423 (9th Cir. 1983) 16

Coleman Mortor Company v. Chrysler Corporation, 525 F.2d 1338 (3rd Cir. 1975) 19, 21

Continental TV v. GTE Sylvania, Inc., 433 U.S. 36 (1977) 22

Industrial Building Materials, Inc. v. Interchemical Corp., 437 F.2d 1336 (9th Cir. 1970) 20

Jefferson Parish Hospital District No. 2 v. Hyde, ... U.S. ....., 104 S. Ct. 1551 (1984) ..8, 10, 11, 12, 14, 15

Krehl v. Baskin-Robbins Ice Cream Co., 664 F.2d 1348 (9th Cir. 1981) 16

Ohio-Sealy Mattress Manufacturing Company v. Sealy, Inc., 585 F.2d 821 (7th Cir. 1978) 21

Photovest Corp. v. Fotomat Corp., 606 F.2d 704 (7th Cir. 1979), *cert. denied,* 445 U.S. 917 (1980) 20

Siegel v. Chicken Delight, Inc., 448 F.2d 43 (9th Cir. 1971), *cert. denied,* 405 U.S. 955 (1972) 10, 15, 16

Jack Walters & Sons Corp. v. Morton Buildings, Inc., 737 F.2d 698 (7th Cir. 1984) 1, 8, 10, 14, 17, 18, 19

Statutes

PAGE

15 U.S.C. § 1 ..... 2, 9

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1331 2

28 U.S.C. § 1332(a)(1) 2

28 U.S.C. § 1337 2

Rule 541(b), Fed. R. Civ. Proc. 3

Other Authorities

R. Posner, ANTITRUST LAW—AN ECONOMIC PERSPECTIVE, 182-83 (1976) 22

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Petitioner Jack Walters & Sons Corporation, by its undersigned attorneys, hereby petitions the United States Supreme Court for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

Petitioner seeks review of the decision of the United States Court of Appeals for the Seventh Circuit in Appeal No. 83-2300, which has been published at 737 F.2d 698 (7th Cir. 1984). The opinion of the district court did not appear in any official or unofficial reporter.

GROUNDS FOR SUPREME COURT JURISDICTION

This Court has jurisdiction to grant the review sought by this petition pursuant to 28 U.S.C. § 1254(1), in that this petition seeks review by writ of certiorari of a decision rendered and judgment entered on June 22, 1984, by the United States Court of Appeals for the Seventh Circuit in a civil case. No request for rehearing or extension of time has been made.

PERTINENT STATUTE

15 U.S.C. § 1.

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

15 U.S.C.A. § 1, United States Code Annotated, p. 5 (1977).

STATEMENT OF THE CASE

Procedural Posture

This is a civil action under the antitrust laws of the United States. Petitioner seeks review of a decision by the United States Court of Appeals for the Seventh Circuit affirming the trial court's dismissal of three antitrust claims and one claim arising under Wisconsin common law.

The court of first instance was the United States District Court for the Eastern District of Wisconsin. That court had jurisdiction of petitioner's antitrust claims pursuant to 28 U.S.C. §§ 1331 and 1337, in that those claims arose under Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, an Act of Congress regulating commerce. It had jurisdiction of petitioner's state law claim pursuant to 28 U.S.C. § 1332(a)(1), in that the adverse parties were

citizens of different states and the amount in controversy exceeded $10,000.

Petitioner sued respondent under Section 1 for allegedly tying the right to use respondent's trademark to the purchase from respondent of common materials and components used in constructing the product covered by that trademark; imposing and enforcing a regime of maximum resale prices; enforcing a regime of unlawful territorial restraints; and imposing an aggregation of vertical restraints for the purpose of absorbing petitioner's business and destroying petitioner as an actual and potential competitor of respondent. Petitioner also sued respondent under state law for alleged violation of a claimed duty of good faith and fair dealing arising out of the relationship between the parties.

Respondent moved for summary judgment and the parties submitted evidentiary materials totalling several thousand pages in support of and in opposition to the motion. The trial court referred the case to a Milwaukee attorney, designated as a special master. The special master recommended in a 50-page report that respondent's motion be granted with respect to the state law claim and with respect to three of the four antitrust claims. The district court adopted this recommendation in a two-page decision and order, making no independent findings or conclusions. On this basis, petitioner's typing, resale price-fixing, and aggregation of restraints claims were dismissed, as was petitioner's state law claim. Petitioner's territorial restraint claim and respondent's counterclaim for trademark infringement were retained for trial.

Upon its determination that there was no just cause for delay and that final judgment as to the dismissed claims should be entered, the district court directed entry of such judgment pursuant to Rule 54(b), Fed. R. Civ. Proc. Peti-

itoner appealed the resulting adverse judgment. In a decision and judgment dated June 22, 1984, the United States Court of Appeals for the Seventh Circuit affirmed the judgment in all respects.

Petitioner seeks review of the Court of Appeals' decision.

Pertinent Facts

In opposition to respondent's summary judgment motion in the trial court, petitioner Jack Walters & Sons Corporation ("Walters") submitted evidentiary material tending to prove the following facts:

Respondent Morton Buildings, Inc. ("Morton") is the dominant firm in the pole building industry.[1] A pole building is a utility structure, used primarily though not exclusively on farms. Its distinguishing feature is the use of a frame of treated, wooden posts individually set in concrete in place of a conventional, poured foundation. Once the superstructure has been built, the building is completed by nailing ribbed, sheet steel to the posts and adding windows, doors, and other accessories.

Morton began selling pole buildings in the late 1940's and early 1950's. Morton's pole building design is not patented or otherwise unique and can easily be duplicated.

In 1962, Walters sought and obtained the exclusive franchise to sell Morton Buildings in Wisconsin. During the period from 1966 to 1968, Morton appointed five other independent dealers in various Midwestern states. These dealers were responsible for selling Morton Buildings in their territories to individual farmers (and other cus-

[1] In 1977, for example, Morton accounted for 42% of sales of branded pole barns in the North Central region, i.e., the one which includes Wisconsin. Morton's total sales in that year amounted to more than $150 million, and Walters' sales of Morton Buildings in that year exceeded $6 million.

tomers) who wished to buy them. Morton itself also sold Morton Buildings directly to farmers through individual, company-owned sales offices. Through the efforts of its sales offices and dealers, Morton's trademark became the dominant and best known mark in the industry.

When Walters or another Morton dealer had completed a sale, it would place the corresponding order with Morton. Morton would then ship to the construction site one or more truckloads of building materials and components, such as sheet steel, nails and wood 2x4's, to be used in constructing the ordered building. These materials were delivered to the site on an open, flat-bed truck. The specific contents of the loads delivered by Morton varied over time, depending primarily on what Morton found it profitable to stock, and never included all materials or components needed in order to construct a Morton Building.

In the case of buildings sold by them, the dealers were responsible for taking the materials and components supplied by Morton, obtaining from other sources any components Morton was not including in its loads at the moment, and constructing the desired buildings from the ground up. The construction of each building was carried out by a crew hired and employed by the dealer, and typically required 160 hours or more of labor.[2]

Morton treated its independent dealers as franchisees and in fact frequently referred to them in that way. The dealers were required to sell only Morton Buildings, in territories established for them by Morton, at prices "suggested" by Morton. Morton closely regulated every

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[2] The photographs included in the appendix to this petition depict the construction process required to build a Morton Building, starting with the point at which the Morton components are delivered to the job site.

aspect of the independent dealers' businesses, from the training of construction crews to the way in which accounts were kept. Morton prescribed the design and appearance of the dealers' sales offices, which were required to conform to a distinctive configuration associated with the Morton name. Morton also regulated its dealers' use of the Morton name in advertising, promotional literature, signs, and so forth. Morton referred to this regime as the "Morton System".

Professor Willard Mueller, former chief economist for the FTC, concluded on the basis of his detailed examination of the Morton System that the relationship between Morton and its dealers was an "enterprise franchise", *i.e.*, a marketing arrangement in which franchisees operate a business enterprise according to a packaged business format, established by the franchisor and identified with the franchisor's trademark. Professor Mueller further classified this enterprise franchise as of the "manufacturing" type, *i.e.*, one in which the franchisees are charged with responsibility for producing the final product, in this case the Morton building, pursuant to plans and designs furnished by the franchisor.

A few of the components included in the Morton package (*e.g.*, roof trusses) were fabricated by Morton itself. Most of the components, however, were common-dimension lumber and similar items obtained by Morton from third-party suppliers, bearing the brands of the third-party suppliers or no brands at all, warehoused by Morton and shipped in response to particular orders. Thus, with respect to buildings constructed by its franchisees, Morton's economic function was primarily that of a supplier and warehouser of common construction materials.

Morton forbade its dealers to purchase from third-party suppliers materials or components which Morton chose

to provide itself even though there was no quality justification for this policy. (Indeed, in most instances the *same* materials were available from other sources.) Because of the nature of what it supplied, *i.e.*, readily available building materials which were less expensive on the open market, Morton had to develop elaborate policing procedures in order to enforce its purchasing restraints. Thus, Morton threatened to terminate dealers who violated these restraints, threatened to raise prices to dealers who complained about them, and procured the agreement of its third-party suppliers not to sell to Morton dealers.

In 1974, Morton made a conscious, corporate decision to transfer profitability from the retail to the wholesale level —that is, from the level at which Morton's company-owned sales offices and Morton's independent dealers operated, to the level at which Morton alone operated. It accomplished this by raising the prices at which its component package was sold to dealers (or book-charged to its own sales offices), while authorizing much lower increases in the price at which Morton Buildings could be sold to ultimate customers. Its purpose was the destruction of its remaining independent dealers. The result of this price squeeze was the elimination of Morton's remaining independent dealers, ultimately including Walters. It simply became economically ruinous for a dealer to sell and build Morton buildings. Faced with economic ruin, Walters began selling pole buildings under its own name, with lumber, nails and other components purchased from independent suppliers, and was as a result terminated by Morton as a Morton dealer. Walters alone among Morton's independent dealers survived to compete with Morton.

REASONS FOR GRANTING REVIEW

In its recent decision in *Jefferson Parish Hospital District No. 2* v. *Hyde*, ... U.S. ....., 104 S.Ct. 1551 (1984), this Court emphasized the preeminent role that empirical data and the economic understanding of that data must play in applying the legal rules which comprise the antitrust laws. In the decision challenged in this petition, the Court of Appeals scarcely paid even lip service to *Jefferson Parish Hospital,* and as a practical matter wholly disregarded the teaching of that decision.[3]

To the rigorous empiricism based on economic fact which informed this Court's decision in *Jefferson Parish Hospital,* the Court of Appeals has opposed a relentless dogmatism based on economic ideology. The decision at issue here is not, and except in the most superficial way does not purport to be, an analysis of the summary judgment record in a real world case or controversy. It does not respect existing legal authority. It is instead an academic exposition—a dissertation upon the merits of a particular thesis of economic policy. The thesis is that tying, and in particular trademark typing, is a disfavored antitrust theory, and, indeed, ought to be wholly discarded. The operating premise is that if facts—not to mention a

[3] A slip of the pen by the Court of Appeals is significant in suggesting the role *Jefferson Parish Hospital* actually played in the Court of Appeals' decision. The Court of Appeals noted parenthetically that *Jefferson Parish Hospital* was "decided after argument in our case". Decision at 6 (737 F.2d at 703). That is not correct. *Jefferson Parish Hospital* was decided the day before oral argument in the present case, and the decision was in fact discussed during oral argument. It was in addition the subject of supplemental memoranda submitted by the parties after oral argument.

competing economic analysis—get in the way of the thesis, so much the worse for the facts. The result is disregard of economic facts properly of record, in favor of three purported, bright-line, *per se* rules of legality:

(1) A trademark holder cannot be held liable for trademark tying under Section 1 of the Sherman Antitrust Act—regardless of the condition of or effect upon the relevant markets, the anticompetitive impact, the state of demand for the alleged tying and tied products or the nature of the economic relationships between the parties themselves or with respect to the product—if the trademark ultimately covers a product (even one manufactured by the franchisee) rather than a service, and if the trademark holder has not offered the trademark separately from the tied materials.

(2) A franchisor cannot be held liable under Section 1 for fixing maximum resale prices and for coercing adherence to the prices so fixed, if it does so in order to protect the credibility of price advertising directed by it to ultimate consumers.

(3) A franchisor, without regard to the amount of market power it enjoys, which has imposed upon and enforced against its independent dealers a complex aggregation of competitive restraints, has procured the active cooperation of third parties in enhancing the effectiveness of that enforcement effort, and has done so for the purpose of destroying its independent dealers as potential, independent competitors, cannot be held liable for this conduct under Section 1 of the Sherman Act beyond the extent to which the individual restraints would be unlawful if viewed in isolation.

These conclusions represent more than a series of conflicts with applicable individual decisions of this Court—although they certainly do represent that. They represent a systematic and implacable repudiation of a generation of antitrust development.

I.

THE COURT OF APPEALS' DECISION DISREGARDS THE APPROACH TO ANALYSIS OF TYING ISSUES PRESCRIBED BY THIS COURT IN JEFFERSON PARISH HOSPITAL.

Ever since the Ninth Circuit's landmark decision in *Siegel* v. *Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972), it has been settled that a trademark can under appropriate circumstances be a separate product for purposes of a Section 1 tying claim. The most recent recognition of *Chicken Delight's* continuing authority was this Court's approving citation of it in *Jefferson Parish Hospital* itself. *See* 104 S.Ct. at 1563 n.35.

In the decision at issue here, the Seventh Circuit has created a gaping exception to this rule. In the case at bar, the Seventh Circuit held that petitioner's tying claim must be rejected as a matter of law because the Morton trademark and the construction materials tied to it were not "separate products". Decision at 10 (737 F.2d at 705-706). This was the case, the Court of Appeals said, because the Morton trademark covered a product rather than a service and such a trademark "is rarely licensed apart from the product—and was not in this case. . . ." *Id.* at 8 (737 F.2d at 704). Upon this basis, the Court of Appeals insisted that what it called "the separate-markets test of *Jefferson Parish* is not satisfied." *Id.*

This analysis reflects a radical misunderstanding of *Jefferson Parish Hospital*. In that decision, this Court specifically and emphatically rejected the suggestion that a seller's decision not to offer the packaged items separately means that the items cannot be separate products for tying purposes:

> The hospital has provided its patients with a package that includes the range of facilities and services required for a variety of surgical operations. . . . [T]he packages includes the services of the anesthesiologist. Petitioners argue that . . . they are merely providing a functionally integrated package of services. . . .
>
> Our cases indicate, however, that the answer to the question whether one or two products are involved turns not on the functional relation between them, but rather on the character of the demand for the two items.

104 S.Ct. at 1561-62. This Court made it clear that the separate-market component of the tying analysis requires inquiry into whether "there is a sufficient demand for the purchase of anethesiological services separate from hospital services to identify a distinct product market in which it is efficient to offer anesthesiological services separately from hospital services." 104 S.Ct. at 1563 (notes omitted). In examining this issue, this Court looked not at what the defendant hospital chose to offer but at what consumers sought to buy, pointing to testimony that "patients and their physicians frequently do differentiate between hospital services and anesthesiological services, and request specific anesthesiologists. . . ." 104 S.Ct. at 1564 n.36.

In the instant case, the summary judgment record included abundant evidence of requests, by Walters and others, to obtain the Morton trademark separately from

the "package" of materials—that is, to continue to build and sell pole buildings meeting the quality specifications and design configurations prescribed by Morton, while obtaining nails, lumber, Sakrete and similar generic, commonly-available items from original sources. The record also included evidence that competitors of Morton in the pole building industry did in fact offer trademarks separately. The record likewise contained abundant evidence of Morton's exploitation of its mark, through the Morton System, to obtain a distinct economic return over and above the value of the materials or components supplied by Morton. The record included finally the opinion of former FTC chief economist Willard Mueller that there was a separate demand for the trademark, that it was economically efficient and practicable to offer the trademark separately in the pole building industry in response to that demand, and that to a reasonable economic certainty the Morton trademark was in fact economically separate from the building materials Morton sold. The decision by the Court of Appeals discussed none of this evidence. Indeed, the Court of Appeals did not even mention Professor Mueller's opinion.

There is a problem with the Court of Appeals' understanding of *Jefferson Parish Hospital,* moreover, which is even deeper and more pervasive. This Court in *Jefferson Parish Hospital* did not purport to create a talismanic "separate-markets test" or any other magic "test" that would permit courts to dispense with the tedious chore of analyzing economic facts. This Court focused instead on the essential question of competitive impact:

> Of course, the Sherman Act does not prohibit "tying," it prohibits "contracts . . . in restraint of trade." Thus, in a sense the question whether this case involves "tying" is beside the point. The legality of

> petitioners' conduct depends on its competitive consequences, not whether it can be labeled "tying."

104 S.Ct. at 1563 n.34.

This Court went on to insist that:

> The definitional question depends on whether the arrangement may have the type of competitive consequences addressed by the rule. The answer to the question whether petitioners have utilized a tying arrangement must be based on whether there is a possibility that the economic effect of the arrangement is that condemned by the rule against tying—that petitioners have foreclosed competition on the merits in a product market distinct from the market for the tying item.

104 S.Ct. at 1563. The essential, anticompetitive vices of tying arrangements, this Court said, include the fact that they may be used covertly to transfer profit to the tied products, 104 S.Ct. at 1558-59 n.19, that they may permit enlargement of a legally granted monopoly, 104 S.Ct. at 1560, and that in general "they restrain competition on the merits by forcing purchases that would not otherwise be made." 104 S.Ct. at 1566.

In the case at bar, Walters' theory, which it amply supported with evidentiary submissions, was precisely that Morton had transferred the profitability inherent in its trademark to commonly available items such as nails, 2x4s and concrete mix, thereby foreclosing competition on the merits in the purchase of those items by Morton's dealers; and that by doing so Morton was able to put itself in a position not only to earn noncompetitive profits but to create for its dealers a squeeze between wholesale costs and resale prices which became an engine of predation. Morton used the tying restraint to raise its dealers' wholesale prices; the resale pricing restraint to keep its dealers from passing the higher costs on to their customers; and the

combination of the two to destroy its dealers as actual and potential competitors of Morton.

The Court of Appeals disregarded this evidence, as well as the entire dimension of the *Jefferson Parish Hospital* analytic approach to which this evidence related, because of a professed fear that recognizing Walters' tying claim would be equivalent to imposing "a regime of compulsory licensing of trademarks . . . ." Decision at 8 (737 F.2d at 704). The extravagance of this comment suggests the extent to which the Court of Appeals missed the point.

Walters has never claimed that the antitrust laws forbade Morton, if it wished to do so, to obtain any building components it thought appropriate by any means it found convenient; to package those components in any combination Morton thought best; and to sell the resulting, dissembled aggregation, at any price the market would bear, to any buyer who wished to buy it, as a "Morton Building". Walters has never contended that, had Morton chosen to proceed in this way, Section 1 would have granted Walters or anyone else the right to buy the Morton name without buying the package to which Morton chose to apply that name.

But that simply is not this case. Abundant evidence in the summary judgment record established that what Morton sold—directly and through its dealers—as a "Morton Building" was *not* the unconstructed aggregation of materials and components for which Morton charged the dealers, but the completed, standing, ready-to-use structure which the individual farmer bought and which the dealer built. It bears emphasis that the erection of a Morton Builuding was not a matter of assembling prefabricated parts from a kit, but a full-scale, on-site, ground-up construction job, performed by the dealer through use of raw materials supplied by Morton and obtained from other

sources and requiring 160 hours or more of labor.[4] This construction is not properly described as the mere assemblage of prefabricated walls, roof and floor; and the dealer's contribution to the final product was neither *de minimis* nor incidental. Indeed, Professor Mueller's analysis showed that the dealer contributed more to the value of the building than did Morton.

Morton, in other words, used the separate power of its mark to create a franchise system in which the end product —the Morton Building—was manufactured not by Morton alone but by Morton in conjunction with its independent dealers. These basic economic facts—facts which fundamentally distinguish the various analogies posited by the Court of Appeals and which directly bear upon the separateness of the mark in this case—were treated as irrelevant by the Court of Appeals.

This Court has never directly addressed the question of trademark tying, and thus has not had an opportunity to analyze the single-product issue in the context of a trademark tying case. For the reasons discussed above, petitioner believes that *Jefferson Parish Hospital's* empirical approach to the single-product issue applies with full force in the trademark tying context. The use of a trademark as the tying product adds a dimension to the single-product issue but, far from diminishing the importance of empirical analysis, as the approach taken by the Seventh Circuit here would suggest, that added dimension emphasizes the necessity of rigorously examining facts specific to the industry and to the economic relationships involved.

Recent Ninth Circuit decisions drawing on that court's seminal ruling in *Chicken Delight*, for example, underscore the key role played by such economic facts in analyzing

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[4] See Appendix.

trademark-related single product problems. *See, e.g., California Glazed Products, Inc.* v. *The Burns & Russell Company of Baltimore City,* 708 F.2d 1423 (9th Cir. 1983) (single product found where defendant limited trademark tie to glazing compound embodying secret and proprietary formulae, and did not attempt to extend it to commonly available masonry blocks); *Krehl* v. *Baskin-Robbins Ice Cream Co.,* 664 F.2d 1348 (9th Cir. 1981) (single product found where defendant limited trademark to ice cream made by secret recipes, and where plaintiff only distributed trademarked product and played no role in producing it).

The case at bar presents economic facts unlike any which have ever been dealt with in a published decision addressing the single-product issue in a trademark tying context. Professor Mueller analyzed those facts exhaustively in reaching his opinion that the Morton trademark functioned as a separate product. The Seventh Circuit's decision implicitly rejects this kind of empirical economic analysis and relies instead on doctrinally deduced rules of *per se* legality which make most of the economic facts irrelevant.

Morton consciously chose to exploit, in the distinctive way classically associated with franchise systems, the separate economic value that attached to the Morton trademark. It did not charge a separate fee for the use of the trademark—neither did the defendant in *Chicken Delight;* instead, it chose to extract the separate value of the mark through the prices it charged its franchisees for ordinary nails, common dimension lumber and other items that were as generic as the chicken, napkins and plastic knives and forks through which the *Chicken Delight* defendant illegally extracted profit from its trademark. It was this conscious, economic choice on Morton's part which brought into play Section 1's requirement that Morton impose only those restraints on competition which were reasonable under the circumstances.

II.

THE COURT OF APPEALS' REJECTION OF WALTERS' RESALE PRICE FIXING CLAIM REFLECTS THE SAME DOCTRINAL REDUTIONISM AS ITS REJECTION OF WALTERS' TYING CLAIM DOES.

Significantly, the Court of Appeals begins its analysis of Walters' resale price-fixing claim by expressing its doubt about the continuing validity of this Court's decision in *Albrecht* v. *Herald Company,* 390 U.S. 145 (1968). Decision at 11 (737 F.2d at 706). Unwilling to press its doubts about *Albrecht* to the point of overtly disregarding it, however, the Court of Appeals proceeds to dispose of Walters' claim by creating a heretofore unknown exception to the rule against vertical price fixing. Under that exception, vertical price fixing is legally unexceptionable as long as the prices fixed are maximum rather than minimum prices, and as long as they are fixed at levels which the manufacturer has specified in advertisements directed by it to ultimate consumers. Decision at 13-15 (737 F.2d at 707-708).

There is no authority for this departure from existing law, and it is impossible to defend it on the basis of logic or policy. A manufacturer certainly has a duty not to advertise falsely to consumers, about prices or anything else. Part and parcel of this duty, however, is the obligation not to make representations to consumers about matters—such as resale prices—which the manufacturer has no right to control. It would be a remarkable departure from prior antitrust learning to suggest that a manufacturer can make a representation to ultimate consumers about the conduct of independent, intermediate dealers of the manufacturer, and can then use that very representation as an excuse to impose corresponding restraints that would not otherwise be legally permitted.

The Court of Appeals further excused Morton's resale price-fixing on the ground that the injury caused to Walters by that price fixing was not the kind of injury that the antitrust laws are designed to prevent. Decision at 15-16 (737 F.2d at 708-709). This was the case, the court said, because the sanction by which Morton sought to enforce the fixed prices was the threat of price competition directed at those who exceeded them. *Id.* at 10 (737 F.2d at 709). Since the antitrust laws encourage price competition, the Court of Appeals reasoned, the threat of being damaged by such competition is not antitrust injury. *Id.*

This analysis reflects a basic lack of familiarity with the facts established in the summary judgment record. The evidence submitted by Walters indicated that Morton's occasional threats to sell directly in Walters' territory were neither the only nor the primary means of enforcing the maximum resale prices Morton fixed. Indeed, in Wisconsin, where Walters sold through several geographically dispersed sales offices, Morton had only one sales office, which served only the area within a 40-mile radius of it. The invidious aspect of Morton's price-fixing activity was precisely that, despite Morton's own inability to sell directly to Wisconsin customers outside a small area, it advertised the prices that it fixed in publications of state-wide circulation—that is, it used advertisements whose only purpose could have been to enhance its coercive, price-fixing effort.

Morton enforced its price-fixing regime with the classic tools of vertical price-fixers: threats of termination, manipulation of individual salesmen's commissions and wholesale discounts, and imposition of a pervasive regulatory regime. These facts do not fit in with the Court of Appeals' analysis, and no mention of them appears in the Court of Appeals' opinion.

The Court of Appeals acknowledged that, "... Walters' affidavits if true indicate that Morton went beyond simply announcing its [price] policy and terminating non-compliers, and used persuasion and policing to obtain that compliance ...." Decision at 13 (737 F.2d at 707). The exception which the Court of Appeals invented in order to permit Morton to avoid the legal consequences of that conduct is indefensible by reference to *Albrecht* and the rule against vertical price-fixing in general.

III.

THE COURT OF APPEALS LIKEWISE ERRED IN REJECTING WALTERS' AGGREGATION OF RESTRAINTS CLAIM.

Walters alleged that Morton imposed a complex aggregation of vertical restraints, including but not limited to the tying, territorial and pricing restraints mentioned above; that Morton enforced these restraints by combining with other parties, *e.g.*, by procuring the agreement of independent building component suppliers not to sell to Walters in violation of Morton's policy; and that when Morton decided to eliminate its independent dealers, it did not simply and straightforwardly terminate them, but used this package of restraints to strangle them over time, so that they would represent no threat to enter the pole building market as competitors of Morton after their termination. The evidence submitted by Walters showed that Walters was the only one of Morton's independent dealers to survive this process, and that only Walters was able after termination of its dealership to challenge Morton in the pole building industry.

Walters, in short, alleged conduct directly analogous to that condemned in *Coleman Motor Company* v. *Chrysler Corporation*, 525 F.2d 1338 (3rd Cir. 1975), and in similar

cases. *See, e.g., Photovest Corporation* v. *Fotomat Corporation,* 606 F.2d 704, 726 (7th Cir. 1979), *cert. denied,* 445 U.S. 917 (1980); *Industrial Building Materials, Inc.* v. *Interchemical Corp.,* 437 F.2d 1336 (9th Cir. 1970).

The Court of Appeals here distinguished *Coleman Motor Company* on the ground that that case had involved claims of predatory pricing, whereas the present case does not. Decision at 18 (737 F.2d at 710). The Court of Appeals then held that Walters' aggregation of restraints claim must be rejected because neither the means employed by Morton—refusing to license its trademark separately and imposing vertical restraints on maximum prices—nor the end Morton sought to achieve—vertical integration—were unlawful. Decision at 18-19 (737 F.2d at 710).[5]

This analysis is fundamentally misguided. Whether or not Morton's vertically-imposed tying or price-fixing restraints were independently unlawful, it is elementary that horizontal collusion with alternative suppliers in order to enforce those restraints is objectionable on antitrust grounds. And, as noted, the territorial restraints which were part and parcel of the Morton System concededly raise triable issues of antitrust legality.

The Court of Appeals' legal absolution of the means employed by Morton makes no sense unless the Court meant to say that every mechanism employed in aid of a system of restraints must be an independent antitrust violation in order for the aggregation as a whole to be a violation. The law is in fact precisely the opposite: the whole is greater than the sum of its parts, not less, and an aggre-

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[5] The Court of Appeals conceded that the territorial restraints might be unlawful, *id.* at 18 (737 F.2d at 710), but asserted without explanation that whatever damages Walters can obtain at trial for those restraints will compensate Walters for the injury it has suffered as a result of the predatory aggregation as a whole. *Id.*

gation of vertical restraints can violate Section 1 even if none of the restraints, taken in isolation, would do so, where it can be shown, as here it was, that the purpose of that aggregation of restraints was the destruction of a potentially competitive enterprise. *See Ohio-Sealy Mattress Manufacturing Company* v. *Sealy, Inc.*, 585 F.2d 821, 827 (7th Cir. 1978).

The Court of Appeals' endorsement of the ultimate objective of Morton's anticompetitive combinations is equally puzzling. To be sure, there is nothing illegal about vertical integration. It goes to the heart of antitrust concerns, however, to integrate vertically by supplanting independent dealers in such a way as consciously to destroy the ability of those independent dealers to re-enter the market in competition with the vertically integrated entity. That is the very anticompetitive vice identified by *Coleman Motor Company*. The Court of Appeals does not explain, and Walters cannot imagine, why this objective is less invidious from an antitrust standpoint because it is accomplished by means of predatory tying, collusive refusals to deal, and restraints on territories and resale prices, than it would be if it were accomplished by means of predatory pricing.

In the case at bar, the Seventh Circuit has expressly approved the conscious and systematic destruction of Walters as a Morton dealer through the use of a combination of wholesale and retail restraints of trade, enforced by coercion and threats, which prevented Walters from competing in either the wholesale market or the retail market. The decision stands for the dogmatic proposition that Section 1 of the Sherman Act cannot reach restraints which, however injuriously, facilitate what the court here viewed as the economically desirable end of vertical integration.

No decision of this Court has ever suggested, much less approved, such an analysis or made such a policy choice. The Seventh Circuit's opinion here attempts to return to the sterile formalism and barren search for mechanical "rules" and "tests" which this Court rejected in *Continental TV* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977). If such a policy choice is to be made, entailing as it does such a radical departure from this Court's previous decisions, it is this Court which should make it.

CONCLUSION

This Court proclaimed in *Jefferson Parish Hospital* that, "[I]t is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable 'per se.'" 104 S.Ct. at 1556. A conflicting view advocated by Judge Posner before he ascended the bench, however, that "[t]he prohibition against tie-ins ought to be radically curtailed. . . ." and that the complete abolition of the rule against tie-ins would be "utopian", has prevailed in the Court of Appeals' decision. *See* R. Posner, ANTITRUST LAW — AN ECONOMIC PERSPECTIVE 182-83 (1976). In the case at bar, without full analysis of the economic facts of record, the Court of Appeals has invented *per se* rules of legality to shield from antitrust scrutiny purchasing and other restraints which were employed predatorily to destroy independent enterprises. The Court of Appeals has sanctioned use of the summary judgment procedure to conjure away factual disputes that were doctrinally inconvenient. Procedural compromise has led to substantive error.

For the reasons outlined in this petition, petitioner respectfully prays that this Court issue a writ of certiorari

to the United States Court of Appeals for the Seventh Circuit for the purpose of reviewing the decision of that court in the case herein.

Dated this 13 day of September, 1984.

Respectfully submitted,

STEVEN E. KEANE
DAVID E. BECKWITH
JOHN S. SKILTON
FOLEY & LARDNER

By .....
STEVEN E. KEANE
Attorneys for Petitioner

FOLEY & LARDNER
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
(414) 271-2400

Of Counsel:
MICHAEL G. LASKIS
MICHAEL A. BOWEN
DENNIS A. HENIGAN

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In the Supreme Court of the United States

OCTOBER TERM, 1983

JACK WALTERS & SONS CORPORATION,

Petitioner,

vs.

MORTON BUILDINGS, INC.,

Respondent.

APPENDIX

STEVEN E. KEANE
DAVID E. BECKWITH
JOHN S. SKILTON
FOLEY & LARDNER
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
(414) 271-2400
Attorneys for Petitioner

Of Counsel:
MICHAEL G. LASKIS
MICHAEL A. BOWEN
DENNIS A. HENIGAN

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

TABLE OF CONTENTS

	Page
Court of Appeals' Judgment	1-2
Court of Appeals' Decision dated June 22, 1984	3-28
Amended District Court Judgment dated July 1, 1983	29
District Court Judgment dated June 24, 1983	30
District Court Decision and Order dated March 11, 1983	31-32
Special Master's Report on Defendant's Motion for Summary Judgment	33-68
Photographs of process of construction of a Morton Building	69-72

In the Supreme Court of the United States

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APPENDIX

App. 1

Opinion by Judge Posner
Judge Swygert concurring
JUDGMENT – ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
June 22, 1984.

Before
Hon. Jesse E. Eschbach, *Circuit Judge*
Hon. Richard A. Posner, *Circuit Judge*
Hon. Luther M. Swygert, *Senior Circuit Judge*

No. 83-2300

JACK WALTERS & SONS CORP.,

Plaintiff-Appellant,

vs.

MORTON BUILDING, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 78-C-329
Terence T. Evans, Judge.

This cause was heard on the record from the United States District Court for the Eastern District of Wisconsin, Division [sic], and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 83-2300

JACK WALTERS & SONS CORP.,

Plaintiff-Appellant,

v.

MORTON BUILDING, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 78 C 329—Terence T. Evans, *Judge.*

ARGUED MARCH 30, 1984—DECIDED JUNE 22, 1984

Before ESCHBACH and POSNER, *Circuit Judges*, and SWYGERT, *Senior Circuit Judge.*

POSNER, *Circuit Judge.* This antitrust suit under section 1 of the Sherman Act, 15 U.S.C. § 1, pits a building-materials dealer, Walters, against a manufacturer of prefabricated farm buildings, Morton. The complaint, filed in 1978, alleges that Morton tied building components to its trademark, assigned its franchised dealers (one of whom was Walters) exclusive sales territories, limited the prices the dealers could charge consumers, and eventually took over the dealership function, terminating Walters in the process. There also is a pendent claim for breach of a duty of fair dealing under Wisconsin law. In 1981, shortly before trial was to begin, Morton moved for sum-

mary judgment. The district judge referred the motion to a special master, a member of the Milwaukee bar. After considering for 17 months the voluminous materials that the parties had submitted in connection with the motion, the special master submitted his report, which recommended granting the motion except with respect to the claim regarding exclusive territories. In a brief order the district judge adopted the master's recommendations in their entirety and therefore dismissed all but the exclusive-territories claim, which he retained for trial. He then directed entry of final judgment for Morton on the dismissed claims upon an express determination that there was no just reason for delay, and Walters has appealed under Rule 54(b) of the Federal Rules of Civil Procedure.

We consider first, on our own initiative as we must, whether the dismissed and retained claims are separate claims within the meaning of Rule 54(b); if they are not, the judgment of dismissal cannot be appealed as a final judgment and Walters must wait to take its appeal until the exclusive-territories claim is tried. Our recent decisions emphasize that trial judges do not have carte blanche to certify partial dispositions for immediate appeal under Rule 54(b). See *A/S Apothekernes Laboratorium v. I.M.C. Chem. Group, Inc.*, 725 F.2d 1140 (7th Cir. 1984); *Minority Police Officers Ass'n v. City of South Bend*, 721 F.2d 197 (7th Cir. 1983). The rule itself makes clear that a district judge may enter an appealable judgment only if it disposes of a "claim for relief" that is "separate" from the claims not disposed of. But unfortunately the meaning that the draftsmen intended "claim for relief" to bear is not clear, see *Local P-171, Amalgamated Meat Cutters v. Thompson Farms Co.*, 642 F.2d 1065, 1069-71 (7th Cir. 1981); 10 Wright, Miller & Kane, Federal Practice and Procedure § 2657 (2d ed. 1983), and the Supreme Court has not yet attempted a compendious definition. See *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427 (1956); *Cold Metal Process Co. v. United Engineering & Foundry Co.*, 351 U.S. 445 (1956); *Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737, 743 n. 4 (1976). The re-

cent decisions of this court have experimented with a practical approach based on what we conceive to be the most important purpose behind Rule 54(b)'s limitations—to spare the court of appeals from having to keep relearning the facts of a case on successive appeals. The approach is: if the facts underlying different claims are different, the claims are separate for Rule 54(b) purposes. For if there are different facts (and of course different issues) consideration of the appeals piecemeal rather than all at once will not involve a duplication in the efforts required of the judges to prepare for argument in, and to decide, each appeal. The gains from forcing the consolidation of appeals will therefore be small and will be outweighed by the benefits of an immediate appeal in resolving the parties' rights with respect to a part of the controversy between them. By the same token, if there is a great deal of factual overlap between the decided and the retained claims they are not separate, and appeal must be deferred till the latter are resolved.

Applying this approach to the present case, we find potential but not actual factual overlap between the charges that the district judge dismissed and the single charge, involving exclusive territories, that he retained; therefore we have jurisdiction of the appeal. A charge that limiting the territories in which one's dealers can sell violates section 1 of the Sherman Act is now evaluated under the Rule of Reason. See *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977). This means among other things that the plaintiff must show that the defendant has market power, see *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 678 F.2d 742, 745 (7th Cir. 1982), as this is a prerequisite to being able to restrain trade unreasonably. The Supreme Court's most recent tying decision requires the plaintiff to make a similar, maybe identical, showing in order to prove that a tying arrangement is unlawful, even though tying still is referred to as a per se offense. See *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 104 S. Ct. 1551, 1559-60 (1984). Moreover, where as in the present case the

plaintiff tries to show that the whole is greater than the sum of its parts—that an "aggregation of trade restraints" is unlawful even if the constituent restraints taken one by one are not—and one of the parts is territorial exclusivity, the issue of unlawful "aggregation" logically requires consideration of the facts concerning territorial exclusivity.

All these are reasons why in the usual case a challenge to a scheme of restricted distribution states only one claim for Rule 54(b) purposes. But this case is unusual in that the particular grounds on which the special master and the district judge disposed of the charges that are involved in the appeal do not overlap, factually or legally, the charge of territorial exclusivity that he retained for trial. A clue to this is that the parties' briefs in this court tell us nothing about the exclusive territories—how large they were, how exclusivity was enforced, how long exclusive territories were in effect, and for what reasons and with what consequences. Although the voluminous record submitted with the appeal contains much on these questions, that is only because the appeal record is the same record that was before the master and the district judge. The parties have made no reference to the parts of the record that relate to exclusive territories. The district judge dismissed the tying charge not because he found that Morton lacked market power, an issue that as we have said would also be highly relevant to the lawfulness of territorial restrictions, but because he found that the tying and the tied products were not separate products and therefore that there could be no tie-in. He dismissed the resale price maintenance and vertical integration allegations (the latter involving Morton's takeover of the retail distribution of its buildings) on evidentiary grounds unrelated to the lawfulness of exclusive territories. And with all of the specific charges other than the territorial charge dismissed, the "aggregation of trade restraints" charge fell of its own weight, like a conspiracy charge when all but one of the alleged participants have been exonerated.

Since, for these reasons, this appeal is unencumbered by any facts bearing on the retained claim, we are entitled to regard that as a separate claim. Its retention by the district court therefore does not deprive us of jurisdiction over the appeal from the dismissal of the rest of the plaintiff's case. This brings us to the merits. We begin with the tie-in charge.

Almost every product can be viewed as a package of component products: a pair of shoes, for example, as a package consisting of a left shoe and a right shoe; a man's three-piece suit as a package consisting of a jacket, vest, and pants; a belt as a package consisting of a buckle and a strap. As shown by the last of these examples, it is possible to describe a product as a package of components even if the components are physically integrated at the point of sale to the consumer. Indeed, much of what is called "manufacturing" is the assembly, i.e., physical integration, of components, often components manufactured by other companies. The manufacturer of an airplane, for example, does not build the whole thing from scratch. Usually he will build just the airframe, consisting of the fuselage, wings, and tail, and he will buy the engine, the wheels, the radar and other electronic equipment and much else besides from other manufacturers and will then assemble the various components to create the finished aircraft. Very few products today are produced like a statue that is made by pouring molten bronze into a cast—the ultimate single product. But to hold therefore that every composite product is a tie-in, subject to the hostile scrutiny to which antitrust law still subjects tie-ins, would place industry under a vast antitrust cloud, and has been rejected. In *Johnson v. Nationwide Industries, Inc.*, 715 F.2d 1233 (7th Cir. 1983), for example, we held that a condominium and a contract for the provision of management services to the condominium owner were a single product, so that the owner could not complain, at least under antitrust law, that the developer who had sold him the condominium had forced him as a condition of being allowed to purchase it to agree to buy the de-

veloper's management services as well. See also *Foster v. Maryland State Savings & Loan Ass'n*, 590 F.2d 928, 932-33 (D.C. Cir. 1978).

The problem is that there is no obvious way of deciding whether a product is a single product or an assemblage of components. The practice has been to classify a product as a single product if there are rather obvious economies of joint provision, as in the left-shoe-right-shoe example. See *Principe v. McDonald's Corp.*, 631 F.2d 303, 309-11 (4th Cir. 1980); Sullivan, Handbook of the Law of Antitrust 449 (1977); Comment, *A New Approach to the Legality of Franchising Tie-Ins*, 129 U. Pa. L. Rev. 1267, 1293 (1981). Although this approach seems to take what would otherwise be a matter of defense and make its absence a threshold requirement of the offense, it does serve to screen out many silly cases. A different but related approach was taken recently in the *Jefferson Parish* case (decided after argument in our case), where the Supreme Court held that products are separate for tie-in purposes if there are separate markets for each product. See 104 S. Ct. at 1562-63. The link to the older view is that if there are not separate markets, this is evidence that the economies of joint provision are overwhelming.

The test of *Jefferson Parish* disposes handily of the shoe example, but could be thought to place decisions such as *Johnson* under a cloud, since there are separate markets for condominiums and for real estate management services. Only time will tell how far the "separate markets" approach of *Jefferson Parish* will be pushed. There are separate markets for sugar and for sugarless breakfast cereals, but it would be surprising to find that a sugary cereal was a tie-in (sugar tied to cereal), assuming the seller refused to sell a sugar-free version. The belt example also becomes problematic under the separate-markets approach. Belts are rarely sold without buckles; but surgical operations are even more rarely sold without anesthesia (held in *Jefferson Parish* to have been tied to the hospital's operating rooms). There may be overwhelm-

ing economies of joint provision for most customers and yet enough customers with idiosyncratic demands to encourage small markets tailored to their needs to emerge, as has happened with ornamental belt buckles. The separate market for ornamental buckles resembles the separate market for anesthesia, which exists because a patient can contract separately with the surgeon and with the anesthesiologist. We doubt that, even after *Jefferson Parish*, belts are tie-ins of buckles to straps; yet we cannot be sure where the separate-markets test will lead.

Still, we are reasonably confident that under that test as under the older, more intuitive test a building is a single product and not a tie-in of the walls, floors, roof, windows, and so forth; for most of these components are not sold in separate markets, though some are. And as Walters' counsel acknowledged helpfully at argument, it does not matter whether, as with hobby kits of various sorts (and even motorcycles, see *Flaminio v. Honda Motor Co.*, No. 83-2164, slip op. at 1-2 (7th Cir. May 2, 1984)), the manufacturer, instead of assembling the components himself at the factory, ships the unassembled components and the actual assembly is done by the customer or by a dealer (as was the case here, before Morton took over the dealer function). It is enough if the end product is a single product; and a single building is a single product.

All this is more or less common ground among the parties and we have gone over it at such length only to dispel any impression that a tie-in case about prefabricated buildings must be based on a claim that the prefabricated parts were tied to each other. That is not Walters' claim. Its claim is that the Morton name, the Morton trademark, is the tying product and the building, the kit of prefabricated building components, is the tied product. The difficulty with this argument is that a product and its name are inseparable. It is one thing to say that a manufacturer of copying machines who requires his customers to buy from him the copying paper that is used in the machines is conditioning the sale of the machines on the customer's purchase of a distinct product; it is quite

another to say that General Motors lets you use the name Buick on condition that you buy the car to which the name is attached. That is a fantastical description of the transaction, and the cases reject the proposition that a tie-in claim can be based on it. See, e.g., *California Glazed Products, Inc. v. Burns & Russell Co.*, 708 F.2d 1423, 1430 (9th Cir. 1983); *Dart Industries, Inc. v. Plunkett Co.*, 704 F.2d 496, 500 (10th Cir. 1983); *Hamro v. Shell Oil Co.*, 674 F.2d 784, 788 (9th Cir. 1982); *Krehl v. Baskin-Robbins Ice Cream Co.*, 664 F.2d 1348, 1352-54 (9th Cir. 1982); *Redd v. Shell Oil Co.*, 524 F.2d 1054, 1056-57 (10th Cir. 1975); *Kugler v. AAMCO Automatic Transmissions, Inc.*, 460 F.2d 1214 (8th Cir. 1972). The only appellate case we can find in which such a claim was accepted is *Warriner Hermetics, Inc. v. Copeland Refrigeration Corp.*, 463 F.2d 1002, 1015-16 (5th Cir. 1972). To accept it would be to impose in the name of antitrust a regime of compulsory licensing of trademarks—an absurd project. Moreover, since a trademark that denotes a product is rarely licensed apart from the product—and was not in this case—the separate-markets test of *Jefferson Parish* is not satisfied.

However, some cases, including several in this circuit, do treat as tying products trademarks that name not a product manufactured by the trademark's owner but a service which he provides to consumers through a system of franchised retail outlets; the tie-in consists of requiring franchisees, as a condition of being allowed to use the trademark, to buy distinct products supplied by the franchisor. See, e.g., *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704, 722 (7th Cir. 1979); *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 585 F.2d 821, 834 (7th Cir. 1978); *Milsen Co. v. Southland Corp.*, 454 F.2d 363, 365 (7th Cir. 1971); *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1971); *Susser v. Carvel Corp.*, 332 F.2d 505 (2d Cir. 1964), cert. dismissed, 381 U.S. 125 (1965). The trademark is analytically separable from the tied product, so there is not the same absurdity in treating the trademark as a tying product as there is when the trademark is simply the name of the alleged tied product, as in our

example of the Buick name and the Buick automobile. "Chicken Delight," in contrast, was the name of a fast-food franchise operation, not the name of a product; and the franchisor, the owner of the "Chicken Delight" mark, manufactured none of the things (which included mixes, fryers, and packaging supplies) that it required its franchisees to buy from it as a condition of their being allowed to use the name. *Siegel v. Chicken Delight, Inc.*, *supra*, 448 F.2d at 48 n. 4. It was a "case of a franchise system set up not to distribute the trade-marked goods of the franchisor, but . . . to conduct a certain business under a common trade-mark or trade name." *Id.* at 48 (footnote omitted). The name and the tied products thus were separable in a way that the name Buick and the car sold under that name are not. Or so at least it can be argued; for the *Chicken Delight* line of cases is not universally delectated. See, e.g., *Principe v. McDonald's Corp.*, *supra*, 631 F.2d at 309; Baker, *The Supreme Court and the Per Se Tying Rule: Cutting the Gordian Knot*, 66 Va. L. Rev. 1235, 1315-17 (1980). And the emphasis in the Supreme Court's recent decision in *Jefferson Parish* on the importance of proving that the owner of the tying product has real market power may doom the franchise trademark cases, as they mostly involve highly competitive retail industries, such as the fast-food business. But we shall not have to get into the broader questions here. All we shall have to decide is whether Morton Building, the name the defendant has given to its prefabricated farm buildings, is more like Chicken Delight or more like Buick—bearing in mind that since this question was decided on summary judgment we cannot answer it in Morton's favor if there is any material fact in dispute.

Morton manufactures some building parts, such as sheet-metal walls and wooden corner posts, buys others from other manufacturers, and ships the unassembled parts to retail outlets for assembly into finished buildings on the farmer's property. The parts when assembled make a rather austere building, even for a farm utility building, and often the dealer will customize the building by add-

ing things that are not part of Morton's kit. A Morton Building is therefore quite likely to contain some parts not supplied by Morton, just as an automobile might have some accessories that had not been supplied by the manufacturer, such as a dealer-supplied car alarm. But whether few or many farmers embellish their Morton Buildings, the inference that Morton really is engaged in manufacturing buildings is inescapable, and we think this fact defeats any effort to separate its name from the product that it is alleged to be tying to it. Maybe Walters is capable, as it alleges, of building from parts it gets elsewhere a farm building identical to the Morton Building; but it does not follow that it can put Morton's name on it, when Morton wants to manufacture the Morton Building itself. If Morton were just selling blueprints for a building and it told the people it sold them to, "You must buy your bathroom faucets from us if you want to use the blueprints," then it might be possible to separate design and product. But if you happen to be in the business of selling faucets, a dealer cannot force you to let him sell, under your name, faucets he gets elsewhere.

To summarize, we hold that there was no tie-in because there were no separate products (or services) tied together. But we emphasize again that it is not alleged that Morton tied accessories to the building kits that it sold, so we need not decide at what point prefabricated building parts cease to be a single product.

The next question is whether Morton violated the per se rule against resale price maintenance. Several times each year Morton would advertise special deals for its buildings. The advertising was directed to the consuming public and mentioned special prices at which consumers could buy the buildings from dealers such as Walters, listing them by name. Morton gave dealers a discount from the wholesale price to make it easier for the dealers to offer consumers the special retail price that Morton had advertised. It was important to Morton that dealers not charge a higher price than the advertised price, because if they did Morton's advertising would lack

credibility—indeed, would be deceptive and create ill will. So, according to Walters' affidavits, Morton took various steps to see that its dealers sold its buildings at no more than the advertised price. These steps included threatening the dealers with termination if they went above that price, offering if they did to sell directly to the public at the advertised price, and checking up on the dealers to see whether they were charging more. Walters also charges that Morton made it hard for the dealers to comply with its desire that they sell at the advertised price by giving them a smaller discount from the wholesale price than the difference between the regular retail price and the advertised price.

The usual form of resale price maintenance, the form that invited condemnation from the Supreme Court in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), involves setting a minimum price below which dealers may not sell rather than a maximum price above which they may not sell. It is minimum price fixing that creates the analogy to a dealers' cartel upon which the per se rule against resale price maintenance rests. Although *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), extended the rule of *Dr. Miles* to a scheme of maximum resale price maintenance, the continued vitality of *Albrecht* is in doubt after *Continental T.V., Inc. v. GTE Sylvania Inc.*, *supra*, held that assigning dealers exclusive territories is not unlawful per se. The newspaper dealers in *Albrecht* had exclusive territories, and putting a ceiling on their prices was, as Justice Stewart pointed out in his dissenting opinion, a way for the Herald Company to prevent the dealers from exploiting the monopoly power that territorial exclusivity gave them. See 390 U.S. at 169. But at a time when exclusive territories, at least if imposed through a sale contract (as in *Albrecht*) rather than an agency contract, were illegal per se, as had been held a year before *Albrecht* in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) (the decision overruled by *Sylvania*), it was not a good defense of maximum price fixing that it was ancillary to

a system of exclusive territories. Now that assigning exclusive territories to dealers is lawful if reasonable, a manufacturer-imposed price ceiling intended to limit the power that exclusive territories give dealers to raise prices regardless of what other dealers in the manufacturer's product are charging may also be lawful in some cases—a proposition suggested by Professor Pitofsky in *The Sylvania Case: Antitrust Analysis of Non-Price Vertical Restrictions*, 78 Colum. L. Rev. 1, 16 n. 59 (1978), and supported by the First Circuit's decision in *Eastern Scientific Co. v. Wild Heerbrugg Instruments, Inc.*, 572 F.2d 883, 885-86 (1st Cir. 1978). The defendant in that case had a lawful system of exclusive territories but allowed its dealers to sell outside their territories provided they did not sell below a certain price. This provision was held lawful because it allowed a little more competition than if the territories had been airtight. The justification for maximum prices within exclusive dealer territories is even more straightforward: it forces price within the territories closer to the competitive level. See Easterbrook, *Maximum Price Fixing*, 48 U. Chi. L. Rev. 886, 890 n. 20 (1981). It is true that, after *Sylvania* was decided, *Albrecht* was cited approvingly in *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 347-48 (1982) (4-3 decision), but only as supporting the proposition that horizontal price fixing is not saved from condemnation merely because the prices fixed are maximum rather than minimum prices, see *id.* at 348 and n. 18, a matter of no significance here. Indeed, the footnote can be read as supporting a distinction between horizontal and vertical maximum price fixing.

But we need not explore this maze further. Since the lawfulness of Morton's territorial exclusivity has not been adjudicated, it is premature to conclude that maximum price fixing would be a lawful incident to it. We mention the point to avoid creating the impression that we consider maximum price fixing always and everywhere unlawful (unless horizontal, in which event it is indeed illegal per se, as held in *Maricopa*, 457 U.S. at 348). That seems to us an open question after *Sylvania*. But even if we assume that maximum price fixing would be un-

lawful in this case, as it might well be if Morton's exclusive territories were unlawful (an issue not before us on this appeal), we must still determine whether the conduct attested to in Walters' affidavits is price fixing. The special master thought that Morton's efforts to compel its dealers to comply with the advertised price, and the dealers' responses, did not create an agreement to adhere to that price; and without agreement there can be no violation of section 1 of the Sherman Act. The picture painted by Walters' affidavits is one not of agreement but of Morton's unsuccessful efforts to force Walters to agree. However, Supreme Court pronouncements which appear still to be authoritative despite the considerable changes in the Court's interpretation of the antitrust laws in recent years indicate that when a seller goes beyond announcing a policy of refusing to deal with price cutters (or in this case price gougers) and of cutting off those dealers who do not comply with the announced policy, it has, for section 1 purposes, conspired with any dealer who complies with the policy. See, e.g., *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960). Here some dealers did comply; and Walters' affidavits if true indicate that Morton went beyond simply announcing its policy and terminating noncompliers, and used persuasion and policing to obtain that compliance, as in *Yentsch v. Texaco, Inc.*, 630 F.2d 46, 49-55 (2d Cir. 1980). See also *Monsanto Co. v. Spray-Rite Service Corp.*, 104 S. Ct. 1464, 1471-73 (1984).

But there is a more fundamental ground, alluded to by the special master, which requires that we uphold the dismissal of this part of the complaint. Walters concedes as it must that it is perfectly lawful for a manufacturer to advertise his product to the ultimate consumer, whether or not he sells directly to the consumer, and to mention in that advertising the retail price of the product—the only price the consumer is interested in. The law of products liability has come to recognize what economists and businessmen have long known—that manufacturers are in a direct economic relationship with the ultimate consumers of their products even if they are not

in privity with them. See, e.g., *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 412-16, 161 A.2d 69, 99-101 (1960). This insight cannot be limited to tort law. The demand for a manufacturer's product depends significantly on the retail price; the lower that price is (other things being equal), the more his product will be demanded by consumers and therefore by the dealers who are his immediate purchasers. Hence the manufacturer has a vital interest in the retail price. Maybe that interest is not great enough to allow him to place a cap on the retail price but Walters concedes that it is great enough to allow the manufacturer to advertise a retail price.

This concession is very damaging to Walters. If it is lawful to advertise a retail price, it should be lawful to take at least the minimum steps necessary to make that advertising beneficial. It would be pretty embarrassing for a manufacturer who had advertised a special retail price to be bombarded by complaints from consumers that dealers were refusing to sell to them at that price. Such refusals would make the advertising misleading and might even expose the manufacturer to legal sanctions under the Federal Trade Commission Act or counterpart state regulations. So if retail price advertising by manufacturers is to be feasible the manufacturer must be allowed to take reasonable measures to make sure the advertised price is not exceeded. These measures include trying to persuade dealers to adhere to the advertised price and checking around to make sure they are adhering. These are the respects in which Morton is alleged to have gone beyond the simple announcement of policy and refusal to deal with noncompliers that would be permissible even if it were trying to get its dealers to adhere to its suggested retail prices across the board. See *Monsanto Co. v. Spray-Rite Service Corp.*, *supra*, 104 S. Ct. at 1469. They are the minimum steps that Morton had to take if its advertised price was to have any value at all, and they are therefore lawful. Cf. *Bruce Drug, Inc. v. Hollister, Inc.*, 688 F.2d 853, 859-60 (1st Cir. 1982).

It is true that dicta in *Butera v. Sun Oil Co.*, 496 F.2d 434, 437 (1st Cir. 1974), based on *Pearl Brewing Co. v.*

Anheuser-Busch, Inc., 339 F. Supp. 945 (S.D. Tex. 1972), suggest that for a supplier to condition a cut in the wholesale price to his dealers on their agreeing to pass it on to the consumer by lowering their prices, which is a little like what is alleged here, is a form of price fixing. But the more recent decisions hold to the contrary. See *Lewis Service Center, Inc. v. Mack Trucks, Inc.*, 714 F.2d 842, 846 (8th Cir. 1983); *AAA Liquors, Inc. v. Joseph E. Seagram & Sons, Inc.*, 705 F.2d 1203, 1206 (10th Cir. 1982). And in none of these cases did the manufacturer have the additional argument that Morton has here: Morton had to pressure its dealers to lower price in order to maintain the credibility of its price advertising—a form, by the way, of constitutionally protected speech. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

All this is not to say that simply by advertising retail prices a manufacturer gets the right to fix retail prices. If Morton had tried to fix its dealers' prices at times when it was not advertising special deals at specific prices, its efforts would not be privileged just because at other times it did advertise retail prices. Nor could Morton require its dealers to comply with minimum prices. And therefore it could not forbid them to sell at less than the advertised prices. See *Lehrman v. Gulf Oil Corp.*, 464 F.2d 26, 39-40 (5th Cir. 1972). But it did not do any of these things.

Even if what Morton did was price fixing, Walters could not challenge it. A private plaintiff can complain only of an antitrust injury. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). It is not enough that the plaintiff would not have been injured but for the defendant's alleged violation of the antitrust laws; the injury must be the sort of thing that the antitrust laws are intended to forbid. The plaintiff in *Brunswick* was complaining that the defendant's acquisition of a rival would enable the rival to become a more efficient company, and therefore a more effective competitor of the plaintiff. The Supreme Court held that the plaintiff could

not complain about the injury. It would have been different if the complaint was that the acquisition would lead to the rival's engaging in predatory pricing or some other method of competition with the plaintiff that the antitrust laws are intended to prevent.

There is nothing esoteric about the *Brunswick* rule. It is the application to antitrust law of venerable principles of tort causation illustrated by *Gorris v. Scott*, 9 L.R. Ex.-125 (1874). The plaintiff's animals, which were being transported on the deck of the defendant's ship, were washed overboard in a storm. They would have been saved if the deck had been penned, as required by statute. But since the purpose of the statute was to prevent contagion, not drowning, the defendant was not liable. Similarly, although the plaintiff in *Brunswick* would not have been hurt if there had been no acquisition, the acquisition did not hurt it in the way that the framers of the antitrust laws had in mind. In the present case, even if Morton did violate the prohibition against fixing its dealers' prices, the only harm to Walters came from the fact that competing dealers (or Morton itself) would lower their prices to consumers if Walters did not. There is no suggestion that the lower prices would have been below cost; they would have been lawful prices. This case thus is stronger for the defendant than *Gorris*. The loss of the animals was a pure social cost, while the loss to Walters from lawful price competition was a gain to consumers. Walters will not be heard to complain about having to meet lawful price competition, which antitrust law seeks to encourage, merely because the competition may have been enabled by an antitrust violation. See *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1161 (7th Cir. 1983); Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury*, 47 U. Chi. L. Rev. 467, 491 (1980).

The remaining antitrust claim that the district court dismissed is that the tie-in, resale price maintenance, and exclusive-territories allegations, taken together, make out an independent violation of section 1 of the Sherman Act,

because they establish a scheme to destroy Morton's independent dealers in order that Morton could take over the retail sale of its buildings, as eventually it did. Our conclusion that there was no tie-in and no resale price maintenance may seem to eliminate all possibility that there was an unlawful scheme of greater compass than the territorial exclusivity, which is not before us on this appeal. But it is possible to recast Walters' argument as follows. Even if there was no tie-in in a technical sense and no resale price maintenance in the sense in which it is a per se violation of section 1, still when one combines what Morton is alleged to have done (such as forbidding its dealers to obtain, from other manufacturers, any Morton Building components that Morton supplies, and squeezing the dealers by forcing them to sell buildings at the low prices that Morton advertised and to swallow part of the discount) with its alleged motive in doing so of driving the dealers out of business, an unreasonable restraint of trade can be inferred. And it meets the threshold requirement of section 1 that there be a contract, combination, or conspiracy, since Morton managed to draw some of its (doomed) dealers into its scheme to eliminate recalcitrants such as Walters.

It does not add much, though, to call the scheme an "aggregation of trade restraints." The term goes back to *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 598 (1951), and as used there, and later in *United States v. Sealy, Inc.*, 388 U.S. 350, 354, 357 (1967), just meant that whether a restriction was illegal per se might depend on what other restrictions the defendant had imposed. A later decision in the interminable Sealy litigation, *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, *supra*, 585 F.2d at 827-28, used a similar approach to conclude that a number of separate provisions in the Sealy licensing agreement, each innocuous in itself, had been combined in such a way as to perpetuate the division of markets that the Supreme Court had held was a per se violation of section 1. All that Walters is asking us to do here is to decide whether its challenge to Morton's system

of marketing raises a triable issue under the Rule of Reason.

It is helpful to recall that at common law a conspiracy was unlawful if the conspirators used unlawful means to a lawful end or lawful means to an unlawful end. *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 293 (6th Cir. 1898), modified and aff'd, 175 U.S. 211 (1899). This is a pretty encompassing definition, and if Walters cannot bring itself within either branch it is unlikely to have a cause of action under section 1. The means, we have seen, were not unlawful, unless the exclusive territories are unlawful; but if they are, Walters can get all the relief it seeks in the trial of the retained claim in the district court. Predatory pricing, alleged in *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1345 (3d Cir. 1975), on which Walter relies as a case where the goal of the alleged conspiracy was vertical integration into retail distribution, is not alleged here.

The end that Walters alleges is that Morton wanted to take over the retail function; in the terminology of industrial organization, it wanted to integrate forward. But vertical integration is not an unlawful or even a suspect category under the antitrust laws: "Firms constantly face 'make-or-buy' decisions—that is, decisions whether to purchase a good or service in the market or to produce it internally—and ordinarily the decision, whichever way it goes, raises no antitrust question." *University Life Ins. Co. of America v. Unimarc Ltd.*, 699 F.2d 846, 852 (7th Cir. 1983). Morton manufactures some of the building components that it includes in the kits that it sells. It is therefore vertically integrated, because it could buy those components on the market instead. There is nothing abnormal about this. If Morton employs its own typists it is vertically integrated, because it could farm out its typing work to independent contractors. When a corporation that has been using a law firm to handle a particular type of litigation hires a lawyer to do the litigation in-house, it is vertically integrating into litigation services. When a law firm that has been buying a billing service from

a computer time-sharing firm buys its own computer to perform the service, it is vertically integrating into computer services. Vertical integration is a universal feature of economic life and it would be absurd to make it a suspect category under the antitrust laws just because it may hurt suppliers of the service that has been brought within the firm.

A common type of vertical integration is for a manufacturer to take over the distribution of his product. Some manufacturers use wholesalers; others, for example the U.S. automobile manufacturers, do their own wholesaling and thus are vertically integrated into wholesale distribution. Some firms, IBM for example, sell their products directly to the public, rather than through independent retail outlets, and thus are vertically integrated into retail distribution. It was not improper for Morton to want to deal directly with the consuming public rather than indirectly through dealers such as Walters. Of course if it set about to do this in an unlawful fashion it would not be immune from liability just because it had an unexceptionable end in view. But that is only because, as we have noted, a conspiracy to attain a lawful end by unlawful means is actionable.

We just said that vertical integration is not an improper objective. But this puts the matter too tepidly; vertical integration usually is procompetitive. If there are cost savings from bringing into the firm a function formerly performed outside it, the firm will be made a more effective competitor. Moreover, the option of vertical integration places competitive pressure on the firm's suppliers and buyers, who know that if they charge too much for their services the firm may decide to perform them itself. It thus increases competition in the markets for those services. Morton claims that the spiraling costs of building materials forced it to cast about for methods of economizing on its operations, and one method it hit on was to do its own retailing. This is a common motivation for vertical integration. True, some economists believe that monopolistic firms might integrate vertically in order to

deny supplies or outlets to competitors, or to make it more costly for new firms to enter the market (because they would have to enter at more than one level of production or distribution), or to facilitate price fixing with their competitors. See 3 Areeda & Turner, Antitrust Law ¶¶ 725-26 (1978). But nothing of this kind is suggested here. Walters does allege that Morton has a big name in the prefabricated farm buildings market, but there is no indication that this is a meaningful economic market that might be worth monopolizing, or that Morton's purpose in integrating into retail distribution was to make life harder for *its* competitors. Its object was to make more money by reducing the cost of retail distribution, not by coercing or excluding (or for that matter colluding with) its own competitors, whoever they may be, or discouraging potential competitors. Indeed Walters' tie-in claim is premised on the ready availability, from other manufacturers, of the building parts that Morton sells in kits from which Morton Buildings are put together. This shows that Morton has no monopoly.

The final substantive question is whether the district court was correct to dismiss Walters' claim that Morton breached its duty under Wisconsin law to deal fairly with a party with which it had a contractual relationship. The dismissal was on the merits; and if it were not for the fact that Walters and Morton are of diverse citizenship and that the amount in controversy between them exceeds $10,000, there would be a question whether retention of this state-law claim after all the federal claims except the challenge to Morton's use of exclusive territories were dismissed before trial was a proper exercise of pendent jurisdiction; for the relationship between the pendent claim and the only retained federal claim is somewhat distant.

Walters does not charge Morton with a breach of contract, in part because Walters has been unable to produce a copy of any written contract though it claims there was one. The charge sounds in tort. But we share the

special master's perplexity as to what tort is being charged. In Wisconsin as in many other states it is tortious for an insurance company to refuse to pay an insured his claim if the company has no colorable basis for its refusal. See, e.g., *Kanzush v. Badger State Mutual Casualty Co.*, 103 Wis. 2d 56, 61-62, 307 N.W.2d 256, 259-60 (1981); *Anderson v. Continental Ins. Co.*, 85 Wis. 2d 675, 687, 271 N.W.2d 368, 374 (1978). But the tort requires a contractual claim so incontestable that the refusal to honor it must have been in bad faith; here, if Walters has any contractual claim at all, it is so tenuous that Walters is not asserting it. Also the tort has not been extended, in Wisconsin anyway, beyond the insurance setting, where the disparity in resources between insurer and insured has seemed to make the bad-faith breaking of contracts especially reprehensible. Indeed, even in that setting the tort has been defined narrowly, as we pointed out recently in *A.W. Huss Co. v. Continental Casualty Co.*, No. 83-1661, slip op. at 5-15 (7th Cir. May 16, 1984).

Fiduciaries have a duty of fair dealing, of course; and in *Estate of Chayka*, 47 Wis. 2d 102, 176 N.W.2d 561 (1970), this duty was extended to spouses executing a joint will—a special relationship resembling a fiduciary one. But it is a big step from this to reading into every commercial relationship a duty of fair dealing not cabined by contractual provisions, express or implied. Statutes in many states, including Wisconsin, give dealers and franchisees special protections against termination. See Wis. Stat. § 135.03. But Walters does not rely on any statute; it relies on a common law tort concept that is not yet the law in Wisconsin. The common law of Wisconsin does not make the franchisor a fiduciary of his franchisees. *Murphy v. White Hen Pantry Co.*, 691 F.2d 350, 355 (7th Cir. 1982).

This completes our discussion of the matters presented in the appeal, but before ending we want to make an observation about the procedure employed by the district court in this case. Although the use of special masters to assist federal district judges in complex litigation is

not only authorized but indispensable to the effective operation of the federal courts under current workload conditions, its scope is limited by Fed. R. Civ. P. 53(b), as follows: "A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it." The reference in this case was proper only if required by "some exceptional condition," since it was not made to assist a jury and did not call for an accounting or a damage calculation; and we doubt that this demanding condition was met. Cf. *Bennerson v. Joseph*, 583 F.2d 633, 642 (3d Cir. 1978). In this more than in any other circuit we must be alert to the danger of overusing special masters, for it was overuse by one of our district judges that led the Supreme Court to issue a writ of mandamus in *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957). Judge La Buy "stated he did not know when he could try the case 'if it is going to take this long.' He asked if the parties could agree 'to have a Master hear' it. The parties ignored this query and the next day [Judge La Buy] entered the orders of reference sua sponte. The orders declared that the court was 'confronted with an extremely congested calendar' and that 'exception [sic] conditions exist for this reason' requiring the references. The cases were referred to the master 'to take evidence and to report the same to this Court, together with his findings of fact and conclusions of law.' . . . [A]ll parties objected to the references . . . ." *Id.* at 253-54 (footnote omitted).

In this case the district judge, also on his own initiative and also because he did not have time for a long trial, and hoping that the special master's report would (as it did) enable the number of issues to be reduced for trial, referred summary judgment proceedings to a special master who prepared a report that the judge then adopted without independent analysis. Since the judge did

not refer the case to the special master for trial, and only one of the parties (Walters) objected, the delegation of judicial power was less extreme than in *La Buy*. But that does not mean it was in conformity with Rule 53(b). Although the materials submitted in connection with the motion for summary judgment ran to several thousand pages, this unfortunately is not unusual in antitrust and other complex litigation; yet it would be contrary to Rule 53(b), as it has been understood and interpreted against a background of concern with the cost and delay created by using masters, to refer summary judgment motions in antitrust cases routinely to masters. See 9 Wright & Miller, Federal Practice and Procedure § 2605 (1971); cf. *MCI Communications Corp. v. American Tel. & Tel. Co.*, *supra*, 708 F.2d at 1169 n. 125.

But unless the delegation of judicial power to the master in this case exceeded the bounds of Article III of the Constitution, it is not reversible error, because Walters has not asked us to reverse the district court's judgment on the ground that the reference to the master violated Rule 53(b). See, e.g., *Hayes v. Foodmaker, Inc.*, 634 F.2d 802, 803 (5th Cir. 1981) (per curiam); 9 Wright & Miller, *supra*, § 2606. The objection was made in the district court but has been abandoned on appeal, so we would not revive it unless we thought the reference was beyond the district court's subject-matter jurisdiction. The district judge delegated a reporting and recommending power rather than the power of decision; it was he, not the master, who entered judgment. True, the master's function was to evaluate a long documentary record and determine whether it presented genuine issues of material fact; the opinion he wrote was indistinguishable in form from a judicial opinion; and the district judge approved that opinion rather than write his own. Walters therefore has a valid gripe about being hustled off to an adjudicative process conducted—and at rather too leisurely a pace—by a private practitioner. If Walters had preserved its objection on appeal we might well reverse, and we would have to do so whether it had or not if we thought the pro-

cedure was so improper as to be beyond the powers granted federal judges by the Constitution, statutes, and rules—which means, practically speaking, so egregious as to warrant reversal even though the issue was not preserved on appeal. We do not think the procedure was quite that egregious, and we naturally are reluctant to prolong the length and increase the expense of this proceeding (already six years old) by vacating the reference on our own initiative. But we trust that in the future the use of special masters in antitrust and other complex litigation will be conducted with greater sensitivity to the problems of excessive delegation of judicial power that such use can create and to the precise language of Rule 53(b), which as we have pointed out requires in a case such as this a showing of "some exceptional condition" justifying the reference to a master.

AFFIRMED.

SWYGERT, *Senior Circuit Judge,* concurring in the judgment.

Walters raises four issues on appeal: (1) whether Morton's trademark was illegally tied to the sale of its building material packages; (2) whether Morton forced Walters to maintain illegally fixed retail prices on periodically advertised specials; (3) whether Walters states a claim under section 1 of the Sherman Act for Morton's alleged predatory scheme to destroy its independent dealers; and (4) whether Morton owed Walters a duty of good faith. I agree with the majority that the district court's disposition of these four issues should be affirmed, although I will address only the first two.

In regard to the tie-in claim, the record can admit of only one conclusion: there was no tie-in because there were not two separate products, *see Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 507 (1969). Under any of the analyses adopted by the courts, the Morton trademark did not constitute a

product separate from the Morton building material package. *See, e.g., Jefferson Parish Hospital District No. 2 v. Hyde*, 104 S. Ct. 1551, 1562-63 (1984) (separate products exist where there are separate markets for each product); *Principe v. McDonald's Corp.*, 631 F.2d 303, 309 (4th Cir. 1980), *cert. denied*, 451 U.S. 970 (1981) (franchise package constitutes single product where the "aggregation is an essential ingredient of the franchised system's formula for success"); *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43, 48-49 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972) (trademark used under "business format system" or "rent a name" franchise constitutes separate product from articles used in production of system but trademark used under a "distribution format system" is integrated with the product or products that it represents).

Walters' retail price maintenance claim is hardly worth discussion. Morton legally could advertise its products for direct sales to consumers at any price it wished. Walters admitted that he was faced with the choice of meeting the price advertised by Morton or making no sales. Thus, any actions by Morton to enforce sales at the advertised price were unnecessary and could not have caused Walters a compensable antitrust injury. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 487-89 (1977).

Unfortunately, I cannot concur in much of the discussion contained in the majority opinion, not because that discussion may not state correct principles of law, but because I believe it is dicta—dicta that might tend to influence and prejudice decisions in cases yet unborn but which may come to this court for review. It could be argued that the discussion of matters other than those actually raised by this appeal has a certain peripheral relevance, but such relevance, if it exists at all, is unnecessary for an understanding and treatment of this case. It is axiomatic, of course, that we should confine our discussion to the legal principles applicable to the case at hand. Shadows cast beyond the facts of a particular case tend to confuse the trial judges and haunt

our own appellate court—inhibiting our freedom to decide future cases according to what we perceive to be the applicable law at that time.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT

JACK WALTERS & SONS CORPORATION

v.

MORTON BUILDINGS, INC.

Amended Judgment dated July 1, 1983

Decision by Court. This action came on for consideration before the Court with the judge Terence T. Evans presiding and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That defendant's motion for summary judgment as to the first (except such portions thereof as relate to territorial restrictions and damages resulting therefrom up until but not beyond the dates of termination of plaintiff's dealership), second, third, fourth and fifth claim of plaintiff's complaint, pursuant to the decision and order entered March 11, 1983 is granted. The claims are dismissed.

/s/ *Terence Evans*
U.S. District Judge

Dated: July 1, 1983

UNITED STATES DISTRICT COURT

JACK WALTERS & SONS CORP.

v.

MORTON BUILDINGS, INC.

Judgment dated June 24, 1983

Decision by Court. This action came on for consideration before the Court with the judge Terence T. Evans presiding and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That defendant's motion for summary judgment as to the second, third, fourth and fifth claims of plaintiff's complaint, pursuant to the decision and order entered March 11, 1983, is granted. The claims are dismissed.

/s/ *Regina J. Toicuri*
Deputy Clerk

Dated: June 24, 1983

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Civil Action No. 78-C-329

JACK WALTERS & SONS CORP.,

Plaintiff,

v.

MORTON BUILDINGS, INC.,

Defendant.

DECISION and ORDER

In an order dated April 8, 1981, I appointed Attorney Bruce C. O'Neill of Milwaukee, Wisconsin, to serve as a Special Master in this case. Subsequently, the defendant Morton Buildings, Inc. filed a motion for summary judgment. Briefs in support of and in opposition to the motion were filed. On October 29, 1982, Special Master O'Neill submitted a report and recommendation on the motion.

After reviewing the Special Master's Report, I scheduled oral arguments and heard from John Skilton on behalf of the plaintiff and Rick O'Neil on behalf of the defendant. In addition, I have received written comments from each side on the appropriateness of the Special Master's Report.

I have now completed a review of the briefs filed on the summary judgment motion. I have also reviewed the post-Special Master Report comments which, as far as the plaintiff is concerned, are essentially a rehash of its brief in opposition to the motion for summary judgment. I have also considered the arguments of counsel made in court during the hearing on December 17, 1982.

Having considered all of the above, I have determined that no useful purpose would be served by my replowing the same fields that have been worked by the Special Master. I believe the Special Master's Report to be a thorough and comprehensive review of the facts in this case and the applicable law. More importantly, I agree with the Special Master's analysis of the issues and I adopt in total, as the opinion of the court, the Special Master's Report of October 29, 1982.

Accordingly, IT IS ORDERED that the defendant's motion for summary judgment be granted as to the plaintiff's Second, Third, Fourth and Fifth Claims of its amended complaint and as to all portions of the First Claim except those relating to territorial restrictions and as to the only surviving issue, damages, if any, are limited to those allegedly suffered by the plaintiff prior to its termination by Morton.

As to the limited remaining issues, IT IS ORDERED that counsel appear for a brief status conference on March 31, 1983, at 9:00 a.m.

Dated at Milwaukee, Wisconsin, this 11 day of March, 1983.

By The Court:

/s/ *Terence Evans*
Terence T. Evans
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF WISCONSIN

C.A. No. 78-C-329

JACK WALTERS & SONS CORP.,

Plaintiff,

vs.

MORTON BUILDINGS, INC.,

Defendant.

SPECIAL MASTER'S REPORT ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

FACTS

Defendant Morton Buildings, Inc. ("Morton"), an Illinois corporation, has brought a motion for summary judgment against plaintiff Jack Walters & Sons Corp. ("Walters"), a Wisconsin corporation. Walters brought this action against Morton on May 25, 1978 seeking injunctive relief and damages based on Morton's allegedly unlawful termination of Walters' dealership and various alleged antitrust violations. The court previously denied Walters' motion for a preliminary injunction.

Morton has sold farm, commercial and industrial "pole" buildings since 1949.[1] Morton is currently the largest

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[1] Morton originally did business under the name Interlocking Fence Company. After changing the name to Morton Buildings, Inc. in the 1950s, Morton ceased selling its buildings through general retail outlets and developed its own system of company-owned sales offices.

seller of such buildings in the United States with over 70 Morton-owned sales offices located in 21 states. Although Morton buildings are not patented, Morton has developed substantial goodwill in its trade name, trademark and also in its logos which appear on the front of its buildings. This goodwill and market acceptance is in part due to Morton's advertising and marketing practices and also in part due to the quality of materials and construction.

In the 1960s and early 1970s, in addition to its own sales offices, Morton sold its buildings through a total of six independent dealers, each of which had requested a Morton dealership. In 1968 the dealers operated 11 independent sales offices. Walters became Morton's first independent dealer in 1962 and was the last remaining independent seller of Morton buildings when Morton terminated its dealership in 1978.[2]

Morton utilized the same basic method of operations with Walters as it did with the other independent dealers and with its own sales offices. After deciding to purchase a Morton building, the purchaser executed a purchase order prepared by Walters and issued under its name. Walters then paid to Morton an amount determined by Morton as the wholesale price of the purchased building. Upon receipt of the signed purchase order and Walters' tender of the building's wholesale price, Morton shipped to the construction site all of the materials needed to construct the completed building.

Morton had the building components sent to the job site from two sources. Certain materials such as lumber, sheet metal, doors, windows and insulation were not manufactured by Morton but were purchased from various sup-

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[2] At one point Walters owned and operated six offices, all of which were located in Wisconsin.

pliers. Morton, at its own plant, ribbed and formed the steel sheets into a roof and siding, manufactured the trusses used to support the roof, and sometimes cut lumber into specified sizes.

The materials shipped to the job site generally bore a sign or placard designating that they represented a "Morton Building". Materials not manufactured by Morton were often shipped in original cartons carrying the suppliers' names.

Once the materials arrived at the job site, the building was erected, usually by Walters' crews, in accordance with specifications contained in Morton's operations manual. Once the construction of the building, which took between 120 and 170 hours, was completed, the building often bore a sign designating its status as a "Morton Building."

Jack Walters first became a Morton dealer by contacting Henry Getz, Morton's president, after viewing a constructed Morton building. The parties did not execute a written dealership agreement,[3] although it was understood that Wisconsin was to be Walters' operating territory. Walters did not act in the corporate form until 1966.

Although Walters did business under the Morton name for a short period of time, it operated under its own name, at Morton's insistence, for the majority of its association with Morton. Although manuals put out by Morton governed Walters' manner of acquiring building purchase orders and erecting Morton buildings, the buildings themselves were covered by a warranty issued at Morton's insistence by Walters. Both Morton and Walters advertised the sale of Morton buildings. Morton's advertisements

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[3] Although Morton developed a written dealership agreement in 1974, it was never utilized because no new independent dealers were formed.

generally included the names and addresses of its dealers and sales offices, including Walters.

Morton has required since 1968 that Walters, along with other dealers and sales offices, purchase from Morton all of the materials required to construct a Morton building, including those materials not manufactured by Morton and which could be purchased elsewhere at a lower price.[4] Beginning in 1976 and at sporadic periods thereafter, Morton increased the wholesale prices which it charged to its dealers and sales offices. Morton contends that the price increases reflected the rising costs of various materials such as steel. Walters contends that it was unable to increase its retail prices in accordance with the wholesale price increase because it would have been unable to compete with other building sellers.

Walters thereafter suffered reduced profits despite an increase in its sales volume. Walters claims that Morton's price increases were intended to force Walters, and did force the other independent dealers, out of business.[5] Morton, on the other hand, contends that because its wholesale price increased covered only a portion of its own increased prices, it also lost profits.[6]

Since at least 1970, Walters repeatedly requested that Morton allow it to purchase building components from

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[4] Morton, at times, has allowed Walters to purchase an isolated item from another source, where Morton was unable to provide the item or it was very impractical for Morton to do so.

[5] Each of the five independent dealers sold its business to Morton upon the termination of its dealership. Morton then operated its own sales office out of each former dealership and hired many of the terminated dealers' employees.

[6] Morton has agreed that the losses suffered by its own sales offices were only losses in the internal accounting sense.

other suppliers. Walters also requested that Morton reduce or rescind its wholesale price increases so that Walters could raise its profit margin. These requests were denied by Morton.

At an October 1977 meeting with Morton, Walters reiterated its requests for reduced wholesale prices and the authority to purchase materials from different suppliers. Walters also informed Morton that it was considering selling its own line of buildings, using materials purchased from other suppliers at a lesser price. In a January 1, 1978 letter to Morton, Walters stated that it was going to sell its own line of "Walters Buildings" in addition to Morton's buildings. Walters stated that it would continue to accept orders for Morton buildings and that Morton's sales would be "substantial" if Morton's wholesale prices were competitive with that of Walters' other line.

Thereafter, Morton, in a January 17, 1978 letter to Walters, terminated Walters' dealership effective June 1, 1978. Morton's letter stated that Walters was not adequately representing Morton, because it represented its own line as better than Morton's, and because Walters sold its line at a lesser price. Morton also stated that Walters was engaged in a conflict of interest.

Walters responded in a March 23, 1978 letter that it would discontinue selling Morton buildings and would instead sell its own line pending resolution of the parties' dispute. Walters stated, however, that it still desired to sell Morton's buildings.

Walters' amended complaint alleges four basic claims: (1) violation of Section 1 of the Sherman Act, 15 U.S.C. Sec. 1, and Section 3 of the Clayton Act, 15 U.S.C. Sec. 14, through (a) illegal tying, (b) resale price maintenance and (c) territorial restrictions; (2) violation of Section 1 of

the Sherman Act and Section 3 of the Clayton Act through unlawful termination;[7] (3) lack of good faith and fair dealing; and (4) unfair competition through solicitation of employees.[8]

THE STANDARD

Morton's motion for summary judgment may only be granted if no material facts are in dispute and Morton is entitled to judgment as a matter of law. Fed.R.Civ.Pro. 54. While the standards required under a motion for summary judgment are strict ones, they do not become more strict solely because the complexities of an anti-trust case are involved. *Lupia* vs. *Stella D'Oro Biscuit Co.*, 586 F.2d 1163, 1166 (7th Cir. 1978), cert. denied 440 U.S. 982 (1979).

To the contrary, the very nature of anti-trust disputes "encourage[s] summary disposition of such cases where permissible," because the treble damage remedy fuels vexatious litigation and large amounts of time and money expended in discovery and trial. *Lupia, supra,* 586 F.2d at 1166.

> "Anti-trust actions have proven to be specially protracted, and difficult for jury consideration. . . .
>
> "We simply cannot turn our heads and ignore the practical realities of complex anti-trust litigation. A

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[7] The viability of this claim depends, of course, on the success of Walters' other claims. Unless Mortons' termination was based on an act or practice violative of the anti-trust laws or Morton's duty of good faith, Walters has no recourse against Morton's decision, for whatever reason, to terminate its dealership.

[8] Walters' amended complaint also contains a fifth claim that Morton violated the Wisconsin Fair Dealership Law, Chapter 135, Stats. In light of *Wipperfurth* v. *U-Haul Co. of Western Wisconsin*, 101 Wis.2d 586, 304 N.W.2d 767 (1981), Walters has dropped this claim.

> trial of this nature places a substantial burden on jurors who are seldom prepared to analyze the complexities of anti-trust claims. . . .
>
> "[W]hen the parties have designated the evidence upon which they will rely at trial, and the Court has had an opportunity to review the evidence and concludes that no reasonable jury could return a verdict for plaintif[f], judicial economy mandates that summary judgment be entered."

Weit vs. *Continental Illinois National Bank and Trust,* 641 F.2d 457, 464 (7th Cir. 1981).

Walters has argued strenuously and at length in its brief and supporting materials that Morton's summary judgment motion shouud be denied because "hotly contested" factual issues exist which may only be resolved at trial. A thorough review of the voluminous materials submitted by the parties reveals that, with one exception, the issues of fact which exist are either not material or are only remotely relevant to the claims presented by Walters. The one exception is that portion of the first claim which alleges a violation of Section 1 of the Sherman Act through territorial restrictions. Because the undisputed material facts entitle Morton to judgment as a matter of law on all other claims, Morton's motion should be granted as to those claims but denied as to the territorial claim.[9]

TYING ARRANGEMENT

Walters' basic claim against Morton is that Morton, by requiring Walters to obtain all of its Morton building materials from Morton as a condition to its continuation as a Morton dealer, created an illegal tying arrangement

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[9] Thus, Morton's contention that the preliminary injunction should control this motion, although unpersuasive, need not be addressed.

in violation of Section 1 of the Sherman Act[10] and Section 3 of the Clayton Act.[11] A tying arrangement occurs where one is forced to purchase an unwanted (tied) product in order to purchase a desired (tying) product. *Northern Pacific R. Co.* vs. *United States*, 356 U.S. 1, 6, 785 S.Ct. 514, 2 L.Ed.2d 545 (1958). Walters alleges that the tying product is the Morton trademark and that the tied products are the materials used in the packaging and assembly of Morton buildings.

A tying arrangement is illegal per se where (1) the tying and tied products are separate and distinct; (2) the tying product possesses sufficient economic power to appreciably restrain competition in the tied product; and (3) a "not insubstantial" amount of commerce is affected by the tying arrangement. *Siegel* vs. *Chicken Delight*,

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[10] Section 1 of the Sherman Act, 15 U.S.C. Sec. 1, provides "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal."

[11] Section 3 of the Clayton Act, 15 U.S.C. Sec. 14, provides in relevant part:

"It shall be unlawful for any person engaged in commerce . . . to . . . make a sale or contract for the sale of goods, wares, merchandise, machinery, supplies or other commodities . . . or fix a charge therefore or discount from, or rebate upon, such price on the condition, agreement or understanding that the . . . purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the . . . seller, where the effect of such . . . sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly. . . ."

Morton has argued in its brief that this case does not involve "goods, wares, merchandise, machinery, supplies or other commodities" so as to trigger the application of the Clayton Act. Because the undisputed facts reveal that no violation of the Clayton Act occurred in this case, the court need not address this argument.

Inc., 448 F.2d 43, 47 (9th Cir. 1971), cert. denied 405 U.S. 955 (1972). Morton does not dispute the existence of the last two factors.

The policy against tying arrangements is aimed at the manipulation of a purchaser's desire for a product which is dominant in one market to coerce him into an unwanted purchase of a product which is less dominant in another market. Competitors are thus denied access to the tied product market, because the economic leverage of the tying product results in the purchase of both the tied and tying products from the party imposing the tying arrangement. *Northern Pacific R. Co., supra,* 356 U.S. at 6, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958). "By shutting competitors out of the tied product market, tying arrangements serve hardly any purpose other than the suppression of competition." *Siegel, supra,* 448 F.2d at 47, citing *Standard Oil Co.* vs. *United States,* 337 U.S. 293, 305-6, 69 S.Ct. 1051, 93 L.Ed. 1371 (1949).

If a per se violation is not found, a tying arrangement nonetheless may be analyzed to determine whether, under the rule of reason, a violation of the anti-trust laws has occurred. *Fortner Enterprises, Inc.* vs. *U.S. Steel Corp.*, 394 U.S. 495, 500, 89 S.Ct. 1252, 22 L.Ed.2d 495 (1969); *Anderson Foreign Motors* vs. *New England Toyota, Etc.*, 475 F.Supp. 973, 981 (D.Mass. 1979).

A crucial requirement of an illegal tying arrangement, however, is the existence of two distinct products. *Fortner Enterprises, Inc., supra,* 394 U.S. at 507, 89 S.Ct. 1252, 22 L.Ed.2d 495 (1969). Because the material undisputed facts show that the Morton trademark is inextricably interwoven with the aggregation of materials comprising the Morton building, the trademark in this case cannot be considered a separate product from the building materials and no illegal tying arrangement thus exists.

No set standard has been formulated for the evaluation of whether an alleged tying product is in actuality so related to the tied product (or vice versa) that one is but part and parcel of the other. The analysis becomes more complex where a trademark or franchise is alleged to be the tying product. While a trademark may under appropriate circumstances be considered a separate product, the methods of analysis utilized by the courts are no less varied than those developed in the consideration of other aspects of the two-product issue. A thorough review of the many approaches to this question, including that of Walters' expert Prof. Mueller, reveals that under each type of analysis the alleged tying product (Morton trademark) is so inextricably intertwined with the alleged tied products (materials comprising the Morton building) that it cannot be viewed as a separate and distinct entity.

—*Seventh Circuit*

The most recent case decided by the Seventh Circuit is *Photovest Corp.* vs. *Fotomat Corp.*, 606 F.2d 704 (1979), *cert. den.* 445 U.S. 917 (1980). The court in *Photovest* held that the Fotomat franchise/trademark was a separate product from both photo processing and a lease which a franchisee was required to acquire from Fotomat. Both of these requirements were held to be illegal tying arrangements. 606 F.2d at 724-5.[12]

The instant facts are, however, distinguishable from those of *Photovest*. *Photovest* concerned the sale of an entire business entity with the franchisee acquiring and utilizing the name of the franchisor as its own and with the franchisee paying a monthly royalty to Fotomat based on gross sales. Fotomat sold 355 such franchises during its first four years in the franchise business. The franchise per-

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[12] For a similar enterprise or business format or rent-a-name franchise, see *Ohio-Sealy Mattress, Mfg. Co.* v. *Sealy, Inc.*, 585 F.2d 821 (7th Cir. 1978), cert. denied 440 U.S. 930 (1979).

mitted the franchisee to operate a drive-thru photo-finishing business out of a distinctive Fotomat kiosk. Morton did not in any way sell its trademark as distinguished from its building packages to Walters.

—*Ninth Circuit*

The first detailed discussion by the Ninth Circuit of the two-product issue as it relates to the use of trademarks was articulated in *Siegel, supra.* In *Siegel,* the defendant franchisor licensed to its franchisees the right to use its method of operations to prepare and market fast food products under its trademark. In turn, it required the franchisees to purchase certain cooking equipment, food supplies and paper packaging exclusively from the franchisor.

The court held that the *Chicken Delight* franchise/trademark (tying product) was distinct from the equipment, mixes and paper products (tied products) required to be purchased from Chicken Delight, and that an illegal tying arrangement existed. In so doing, the court analyzed the "function of the aggregation", including whether the "amalgamation of products" resulted in cost savings and whether the items were generally sold or utilized as a unit. 448 F.2d at 48. In addition, the court scrutinized the relation of the trademark to the tied products, stating, 448 F.2d at 48-9:

> "The burgeoning business of franchising has made trademark licensing a widespread commercial practice and has resulted in the development of a new rationale for trademarks as representations of product quality. This is particularly true in the case of a franchise system set up not to distribute the trademarked goods of the franchisor, but as here, to conduct a certain business under a common trademark or trade name. Under such a type of franchise, the trademark simply reflects the goodwill and quality standards of the enterprise which it identifies. As

> long as the franchisee lives up to these quality standards and remains as represented by the mark so that the public is not misled, neither the protection afforded the trademark by law nor the value of the trademark to the licensee depends upon the source of its components.
>
> "This being so, it is apparent that the goodwill of the Chicken Delight trademark does not attach to the multitude of separate articles used in the operation of the licensed system or in the production of its end product. It is not what is used, but how it is used and what results that have given the system and its end product their entitlement to trademark protection. It is to the system and the end product that the public looks with the confidence that established goodwill has created."

The *Siegel* court's analysis was recently expanded and refined in *Krehl* vs. *Baskin-Robbins Ice Cream Co.*, 664 F.2d 1348 (9th Cir. 1982). In *Krehl*, the court held that no illegal tying arrangement existed where a Baskin-Robbins franchisee was required to purchase its ice cream from an area franchisor. In reasoning that the Baskin-Robbins franchise was inextricably linked to the ice cream sold by the franchisee, the court expanded on the differentiation, earlier referred to in *Siegel*, between the "business format" and "distribution format" franchise systems.

Under a "business format" system as occurred in *Siegel*, the franchisor provides the trademark ("Chicken Delight") under which the franchisee conducts its business and assumes full responsibility for the production and preparation of the end product. Because only a remote connection exists between the trademark and the products which the franchisees are required to purchase, the consumers have no reason to associate the tying and tied products. The trademark represents "the goodwill and quality standards of the enterprise which it identi-

fies." 664 F.2d at 1353, quoting *Siegel, supra,* 448 F.2d at 48-9.

On the other hand, under a "distribution format" system as existed in *Krehl,* the franchisees are merely conduits through which the trademarked goods of the franchisor flow. In this situation the trademark represents the end product produced through the franchise system, and the desirability of such trademark ("Baskin-Robbins") depends on the perceived quality of the product which it represents (ice cream):

> "The desirability of the trademark and the quality of the product it represents are so inextricably related in the mind of the consumer as to preclude any finding that the trademark is a separate item for tie-in purposes." 664 F.2d at 1353-4.

Krehl thus focused on the relationship between the franchisor and franchisee in evaluating the function of the trademark.

The undisputed material facts show that, if Morton is a franchisor in any respect, it was operating a "distribution format" system as occurred in *Krehl* and not the "business format" system exemplified in *Siegel.* Morton neither is in the business of selling or licensing franchises nor sold a particular franchise to Walters. Indeed, Walters did not conduct its business under the "Morton Buildings" name but operated as an independent entity apart from Morton. Walters represented itself as a "builder" of Morton buildings, with Morton retaining the role of supplier, and conducted all aspects of its business, including its office designation, advertising and the execution of building purchase orders, under its own name.

While Walters sold and erected Morton buildings it was, in actuality, a conduit through which Morton distributed its buildings to the customers. Consumers did

not purchase a "Walters building", although they purchased a building from Walters. Rather, they purchased a specific type of building package—the "Morton Building"—whose quality is confirmed by the building package's source-name identification. The quality of the "Morton Building" name is dependent upon the quality of the source of the building itself—the individual material components. The quality of the trademark thus cannot be separated from the quality of the product which it represents.[13]

—*Fifth and Sixth Circuits*[14]

Trial courts in the Fifth and Sixth circuits have analyzed the two-product question in terms of whether the alleged tying trademark is a representation of product quality or of product origin.[15] The distinction between the two types of trademarks was explained in *Refrigeration Engineering Corp.* vs. *Frick Company*, 370 F.Supp. 702, (W.D.Tex. 1974). In *Frick*, a factor (distributor) was terminated by a manufacturer for failing to enthusiastically promote the Frick line of products. In denying the

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[13] In this respect the tied products are not remote from the trademark which, in fact, represents their source and identity.

[14] Walters has referred the court to *Carpa, Inc.* v. *Ward Foods, Inc.*, 536 F.2d 39 (5th Cir. 1976). *Carpa* is distinguishable because it dealt with a pure "enterprise franchise" which does not exist in this case. The discussion in the parties' briefs in this case revolves around *Carpa's* discussion of the injury resulting from an illegal tie-in. While *Carpa's* analysis of this issue is unpersuasive, it need not be addressed because of the conclusion that an illegal tying arrangement does not exist.

[15] A trial court in the Ninth Circuit also has utilized this analysis. See *Mid-America ICEE, Inc.* v. *John E. Mitchell Co.*, 1973-2 Trade Cases ¶74,681 (D. Ore. 1973).

factor's motion for a preliminary injunction, the court stated, 370 F.Supp. at 711:

> "While lower courts have, in some recent cases, held that a trademark may be a separate product to which another product may be tied, these cases make it clear that only certain specific trademarks, of the "representation of product quality" type, may be separate products and therefore be involved in tying. Such trademarks are in fact separately marketable, and are sold by "rent-a-name" type franchisors. They are not simply "representation of product origin" type trademarks, which are not sold separately. . . .
>
> "The court is impressed by the argument of defendant that, to hold that a distributorship relationship is a tying product, to which is tied all products which a manufacturer desires to sell, would render all exclusive dealing arrangements per se illegal. . . ."

See also *Detroit City Dairy, Inc.* vs. *Kowalski Sausage Co., Inc.*, 393 F.Supp. 453 (E.D. Mich. 1975).

Walters' argument that the Morton trademark is a representation of product quality, as opposed to product origin, is unpersuasive. Walters has agreed that one of the selling points of a Morton building is that all of the materials comprising the building package are derived from one source—Morton.[16] Whether Morton itself pur-

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[16] Walters argues that the question is not whether the materials are essential to the consumer's perception of the trademark but whether the materials are essential to the franchise. This factor is only relevant after a per se violation is found to exist, when the question of justification arises. *Principe* v. *McDonald's Corp.*, 631 F.2d 303, 309 (4th Cir. 1981); *Kugler* v. *AAMCO Auto Transmission, Inc.*, 460 F.2d 1214, 1216 (8th Cir. 1972); *Siegel, supra*, 448 F.2d at 49; *Kowalski, supra*, 393 F.Supp. at 460, 471. Further, Walters' claim that the materials are not essential to the Morton buildings because they can be obtained from other sources begs the question. While the precise materials selected by Morton may be interchangeable with other similar materials, it is Morton's stamp of approval on these materials which is essential to the success of the Morton trademark.

chased some of its materials from different suppliers is irrelevant because the trademark represents that whatever materials used have been chosen by Morton. Thus, while the Morton trademark does represent the quality of the product sold—the building package, it does so in the context of the quality of the source of materials comprising the product.

Further, under the standard articulated in *Frick,* the trademark is not a representation of product quality because Morton is not in the business of selling franchises. Indicative of this is the fact that Morton wanted Walters to operate its business under its own name. In addition, although Morton at one time had six independent dealers, these dealers were merely an adjunct to its own retail outlets which formed the crux of its operations.

Morton does not market its trademark independent of its building packages, or utilize it aside from the sale or advertisement of Morton buildings. Under these facts, the Morton's trademark was a representation of the origin of its products and was not a mere representation of product quality.

—Tenth Circuit

The Tenth Circuit evaluated the two-product claim in terms of the "most important product" in *Redd* vs. *Shell Oil Co.,* 524 F.2d 1054 (10th Cir. 1975), cert. denied 425 U.S. 912 (1976). In *Redd,* the plaintiff, a "jobber" who purchased oil products from the defendant for resale to the public, was prohibited from selling oil products other than the defendant's under the defendant's name. While the plaintiff in *Redd,* in contrast to Walters, was allowed to sell products other than the defendant's, the plaintiff, like Walters, did not hold a franchise as that term is gen-

erally understood. Like Walters, the plaintiff operated his own business under his own name. The court in *Redd* held that the Shell trademark was not a separate product from the fuel which it represented, stating that "the most important product sold was the gasoline . . . this was the typical sale of a trademarked product." 524 F.2d at 1057. See also *Barnosky Oils, Inc.* vs. *Union Oil Co. of Calif.*, 1979-1 Trade Cases ¶62,668 (E.D. Mich. 1978).

Under the *Redd* analysis, the Morton trademark is not a separate product from the building, because the most important product sold under it is the Morton building package. Walters' claim[17] that *Redd* is "fundamentally different" because the plaintiff did not manufacture the end product is without merit. Contrary to the assertions of Walters and its expert Prof. Mueller, Walters did not "manufacture" a building by constructing it from a truckload of materials shipped to the job site. Although the erection of the building may have had a certain "value added" quality, any such value was minimal in relation to the actual value of the materials in each building package.

—First Circuit

Anderson, supra, is one of the few cases which has attempted to bring together the various factors articulated by the courts in analyzing the two-product issue. The Massachusetts District Court in *Anderson* held that an illegal tying arrangement existed where foreign car dealers were required to accept the delivery services offered by a distributor in order to receive automobiles for sale to the public. After examining several two-product cases, in-

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[17] Walters' makes the same claim with regard to *ICEE, supra,* and *Frick, supra.* Its argument is also unpersuasive as applied to these cases for the same reasons discussed in the basic text.

cluding *Siegel, supra,* the court drew out the following factors as common to the evaluation of a "single product" claim:

(1) the structure of the alleged single product;

(2) the market practices of the defendant with respect to the product;

(3) the behavior of other industrial sellers of the product; and

(4) the efficiency or business justification for the combination of the tied and tying product.

475 F.Supp. at 982.

As with the decisions of the other courts discussed herein, the correct application of the criteria suggested in *Anderson* to the undisputed facts reveals that, as a matter of law, the Morton trademark is not separate from the package of building materials which it represents. Contrary to Walters' assertions, the "product" supplied by Morton and sold by Walters is more than isolated pieces of lumber, doors, windows and hardware. Rather, it is a complete building package, the quality of which is represented by the package's source—Morton. While the basic Morton building package may be modified to a small degree by the desires of an individual purchaser, each building package varies only slightly from the next. All packages are sold as a single unit, and the purchaser is not charged separately for the materials used.

Morton's marketing practices are calculated to promote its buildings as single-unit packages, and, more importantly, as "Morton Buildings." The truckload of shipped materials and the completed building bear signs which denote the entire group of materials as representing a Morton building. Its advertisements further emphasize that the

consumer is purchasing a particular building package which reflects the quality of the package's source.

The facts raised by Walters to show that Morton does not follow the industry norm in requiring its dealers to purchase all materials from Morton are irrelevant to the instant case. The first company relied on by Walters, Doane Agricultural Services, has not been in business for over 12 years. While it was in business, it also marketed building designs as opposed to mere building packages. Another company relied on by Walters, Bonanza, is in the business of selling franchises. Its business organization and relation with its franchisees are thus basically distinct from that of Morton. The third company, Wickes, never executed the agreement referred to by Walters and later altered its own policy to require that its franchisee purchase all of its materials from Wickes. Walters has provided no other evidence from which the court could conclude that Morton's policies are atypical of those of similar businesses in the "package" building industry.

While *Anderson* considered the business justification for the combination of the tied and tying product to be a factor in the determination of whether a single product in fact exists,[18] the great majority of courts have reached this question only after determining whether a single product exists in the first instance.[19] This appears to be the better

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[18] The court in *Anderson* held only that the question of business justification enters after a prima facie per se violation is found to exist. 475 F.Supp. at 981. While, as a matter of law, two products do not exist in this case, the discussion of *Anderson* following this footnote is necessary to avoid additional clouding of this already foggy issue.

[19] See *Ware* v. *Trailer Mart, Inc.*, 633 F.2d 1150 (6th Cir. 1980); *Ohio-Sealy Mattress Mfg. Co.* v. *Sealy, Inc.*, 585 F.2d 821 (7th Cir. 1978); *Northern* v. *McGraw Edison Co.*, 542 F.2d 1336 (8th Cir. 1976); *Siegel, supra*, 448 F.2d at 43; *Susser* v. *Carvel Corp.*, 332 F.2d 505 (2nd Cir. 1964).

reasoned approach. The question whether a single product exists or whether two products are really involved has come down, in each approach followed by the courts, to the function of the tying product in relation to the tied product. If the nature of Morton's trademark is such that it cannot be separated from the building package which it represents, whether a less costly alternative can be found or whether certain of its materials are interchangeable is irrelevant. If, on the other hand, two distinct products exist, the justification for the illegal tying arrangement is then put in issue. Although there is no need to apply *Anderson's* "justification" factor to the initial determination of the two-product issue, the undisputed facts are more than satisfactory to show that under the remaining factors discussed in *Anderson*, Morton's trademark is not, as a matter of law, a separate product from the materials comprising the Morton building.

MUELLER ANALYSIS

Walters has relied extensively on the affidavit of its expert, Prof. Mueller, which analyzes the two-product issue in relation to certain economic factors. The factors articulated by Prof. Mueller are as follows:

(1) Responsibilities and contributions of the parties.

(a) Is the dealer merely a distributor of a product or does it operate an enterprise that makes the product?[20]

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[20] Prof. Mueller views Morton's business as a manufacturing or processing business type of the enterprise franchise, under which the franchisor provides the "ingredients" for the product which is ultimately constructed by the franchisee.

(b) How much value does each party contribute to the product?

(c) Which party assumes responsibility for warranting the end product?

(d) What are the customers' perceptions of the functions performed by the parties?

(2) Industry practices regarding product separability.

(a) Do firms in the same or similar industries sell the products separately?

(3) Motives in imposing the tie-in.

(a) Is it necessary to protect the quality of the end product?

(b) If quality control is essential to creating the product, can it be imposed by less restrictive means?

(c) Is coercion used to increase profits in selling the tied product?

Several of Prof. Mueller's factors are irrelevant to the determination of whether two products exist. Further, the undisputed facts, when applied to the remaining factors, reveal that in contrast to Prof. Mueller's conclusion only one product exists in this case.

Responsibilities and Contributions of the Parties.

(a) Prof. Mueller's attempt to characterize Morton's business as an enterprise franchise is unpersuasive. Morton was never in the business of selling franchises. While the independent dealers may have contributed significantly to Morton's sales percentages, Morton, during its 33-year involvement in the industry (including its predecessor com-

pany), operated predominantly through its own retail outlets or sales offices.

Prof. Mueller accurately suggests that Morton's relation with its dealers is *more like* the "manufacturing" enterprise, under which the franchisee often constructs the end product, than the "product" enterprise, under which the franchisor retains total operational control. However, even under Prof. Mueller's analysis, an enterprise franchise ("product" or "manufacturing") is one in which the franchisee's business is established and identified with the franchisor's trademark. In the instant case Walters operated under its own name. Even if, as Prof. Mueller states, an enterprise franchise may exist without the franchisee adopting the franchisor's name, Walters has not established and identified its business enterprise with the Morton name. Its purchase orders, advertisements, employee apparel and business cards, while at times indicating that Walters sells Morton buildings, all retain Walters' identity as separate from that of Morton.

(b) Prof. Mueller places great reliance on the value added to the completed building by Walters, primarily as a result of Walters' erection of the truckload of materials into the completed building. However, Walter's own figures show that Walters' construction constituted only approximately 10% of the value of the completed building package. Walters' remaining contribution resulted basically from its goodwill. Contrary to Prof. Mueller's contention, Morton has contributed the majority of the value of the completed building through its provision of the building package components, its assurance of the quality of such materials through its selection process, and its overall supervision of Walters' marketing practices.

(c) Prof. Mueller's reliance on Walters' warranty on the completed building package is misplaced. Walters is the logical party to warrant its own construction of the

building. Morton, on the other hand, warrants (to Walters) the quality of the building package materials which it has selected and provided to Walters' crew for erection. Morton's warranty is more significant than Walters', because it reaffirms the status of the Morton trademark as a representation of the origin of the building package rather than a mere representation of the quality of the building itself.

(d) Prof. Mueller also relies on a study in which farmers chose guaranties, warranties and follow-up services as the most important factors in selecting a builder from which to purchase a farm building. This, however, only shows that these qualities were important factors in their selection of Walters, which represented itself as the builder of the Morton package. It reveals absolutely no information relative to the customers' perceptions of Morton, which consistently has designated itself as the supplier of the building packages.

Under a different study cited by Prof. Mueller, a higher percentage of farmers chose Morton buildings because of the quality of the materials and construction than chose other brands for those reasons. Among purchasers of Morton buildings, the quality of workmanship and materials was ranked as a more important factor than the warranty, reputation of the builder (Walters) or price. The warranty issued by Walters was much less of a selling point. Thus, customers purchased the Morton buildings because of the source/quality represented by the Morton name.

Industry Practices. The companies relied on by Prof. Mueller as representative of industry standards were discussed in relation to *Anderson, supra,* and need not be repeated here.

Morton's Motive. As previously discussed in relation to *Anderson, supra,* Prof. Mueller's inclusion of Morton's motive for requiring Walters to purchase the building

package materials from Morton is irrelevant to the initial determination of whether two products exist. *Siegel, supra,* 448 F.2d at 49. Just as the good faith of a franchisor cannot merge two different products into one, "a single product does not become separate and distinct products because of a malevolent intent." *ILC Peripherals, Etc.* v. *International Bus.,* 448 F.Supp. 228, 234 (N.D. Cal. 1978).

Thus, under the analysis of Professor Mueller and of the courts, the Morton trademark is not a separate product. While the foregoing portion of this report is unusually long, an extended discussion was warranted due to the complexities of the tying issue, the cloudiness of the various court decisions and the able, although massive, presentations made by the parties. The conclusion reached, however, is analogous to the Morton building package. It, like the Morton trademark, represents the quality of the source of the materials—the application of the facts to the legal standards—which comprise the "legal package"—the law of tying arrangements. Just as the goodwill associated with the conclusion reached is attributable to the quality of the source of the "legal package" materials, the goodwill associated with Morton's trademark is attributable to the quality of the source of the building package materials.

Thus, the court's decision will be inextricably intertwined with the materials comprising the law of tying arrangements just as Morton's trademark cannot be separated from the materials comprising the Morton building. Because one crucial requirement for an illegal tying arrangement—the existence of two distinct products—is not present, the defendant's motion should be granted as to this claim.[21]

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[21] Because of the disposition of this claim on the stated grounds, no consideration need be given to Walters' claims of coercion, lack of justification and injury.

ADVERTISED SPECIALS

Morton's motion for summary judgment as to Walters' claim of retail price fixing also should be granted. Several times during each year Morton advertises certain "specials" under which a particular style of building is sold to the public for a limited time at a reduced price. The advertisements of such discounts state the reduced price and list the names and addresses of Morton's sales offices and independent dealers, including Walters. Morton then offered to sales offices and independent dealers discounts on the wholesale prices charged to them for each "advertised" special sold.

Walters contends that by virtue of the advertisements' inclusion of the retail sales price and coercive tactics by Morton, it had no choice but to sell the buildings at the discounted rate. Walters further claims that because the wholesale price discount received by it was less than the retail price discount given to the consumers, Walters' profit margin was reduced for each "advertised special" sale made.

While a retail price fixing arrangement setting maximum or minimum prices constitutes a per se violation of the Sherman Act,[22] *Arnott* vs. *American Oil Company*, 609 F.2d 873, 885 (9th Cir. 1979), cert. denied, 446 U.S. 918 (1980); *Lehrman* vs. *Gulf Oil Corporation*, 464 F.2d 26, 41 (5th Cir.), cert. denied 409 U.S. 1077 (1972), the mere announcement of a pricing policy and the unilateral re-

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[22] While no express contract existed relative to the "advertised specials", Walters' acquiesence in the set retail price may be seen as constituting a "combination" with Morton for the purposes of the Sherman Act. *Yentsch, supra*, 630 F.2d at 51; *Arnott, supra*, 609 F.2d at 885; *Pearl Brewing Co.* v. *Anheuser-Busch, Inc.*, 389 F.Supp. 945, 950 (S.D. Tex. 1972).

fusal to deal with those who act to the contrary is not violative of the anti-trust laws. *Yentsch* vs. *Texaco, Inc.*, 630 F.2d 46, 51 (2d Cir. 1980). Where, however, a producer or supplier secures adherence to a suggested price through coercion and intimidating actions going beyond a mere refusal to deal, a per se violation exists. *Yentsch, supra*, 630 F.2d at 52; *Lehrman, supra*, 464 F.2d at 37; *Sahm* vs. *V-1 Oil Company*, 402 F.2d 69, 71 (10th Cir. 1968); *Pearl Brewing Co., supra*, 389 F.Supp. 945, 951 (S.D. Tex. 1972).

The evidentiary documents and materials submitted by Walters are insufficient as a matter of law to raise a factual issue relative to Morton's coercion of Walters' acceptance of the discounted retail prices. Of the many affidavits submitted in support of its position, Walters has provided the court with only one general allegation that Morton threatened to terminate Walters if Walters did not follow the advertised prices. Its remaining references to Morton's alleged coercion involve (1) Morton's policy statements and directives relative to the computation of the sales price and discounts; (2) Morton's use of "roving supervisors" to monitor its dealers' general performance; (3) Walters' complaints as to its inability to receive wholesale discounts for buildings not sold at the retail discount;[23] and (4) Morton's response to Walters' complaints of the advertisements' inclusion of a retail price figure, that if Walters objected, Morton would sell in Walters' territory at the discounted price.[24]

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[23] This practice is, of course, proper. See *Butera* v. *Sun Oil Co., Inc.*, 496 F.2d 34 (1st Cir. 1974).

[24] Morton's actions would not be violative of the anti-trust laws as long as Morton did not use coercive tactics to destroy competition. The facts show no evidence that Morton tried to "wipe out" Walters in this regard, particularly since Morton could simply terminate its relationship with Walters upon reasonable notice. See *Neugebauer* v. *A.S. Bell Co.*, 474 F.Supp. 1073 (D.Md. 1979).

The crux of retail price fixing is that it violates the dealer's freedom to independently determine the price levels which he will maintain. *Albrecht* vs. *Herald Co.*, 390 U.S. 145, 152, 88 S.Ct. 869, 191 L.Ed.2d 998 (1968), reh. denied 390 U.S. 1018 (1968); *Pearl Brewing Co., supra*, 389 F.Supp. at 955. The existence of Morton's advertisements, however, and Walters' conclusory allegation that at an unidentified point it complained to Morton and was generally threatened with termination are insufficient to show that Morton conditioned the continuation of Walters' dealership upon its sale of buildings at a discounted retail price during certain periods. This is not a situation of continued intimidation and coercion as occurred in *Sahm, supra, Lehrman, supra, Arnott, supra*, or *Albrecht, supra*.[25]

Jim Walters testified that, even if Walters' name had not been in the ads, its customers still would have looked to Walters for the discounted price. He further testified that Morton offered to delete Walters' name from the ad. There can be no question that Morton could advertise any price it desired for its own sales offices. Thus, the effect was the same whether Walters' name was in the ad or not.

Consumers, after reading the advertisement or contacting a Morton sales office, would have requested that Walters provide them with a price in accordance with that offered by the other sales offices. To be competitive Walters then would have had to sell the building at a reduced rate. Morton's motion should therefore be granted with respect to Walters' claim of retail price fixing.

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[25] Walters' reliance on *Cokeley* v. *Tandy Corp.*, 1973-1 Trade Cases ¶74,342 (N.D. Cal. 1973) is misplaced. *Cokeley* held only that, under its facts, summary judgment was improper.

UNFAIR COMPETITION

Walters contends that Morton intentionally and maliciously "hired away" certain of its employees, in part by disrupting their working relationship with Walters, in order to reduce Walters' competitive capabilities. In support of its position, Walters relies on the affidavit of Bill Walters which alleges that after Morton terminated its relationship with Walters in 1978 (1) Morton contacted certain unnamed former and current employees of Walters; (2) Walters was forced to fire certain employees who did not want to work and were "deliberately" inviting dismissal; and (3) Morton thereafter hired many of these persons.

These allegations are insufficient to support a claim of unfair competition by Walters. From the moment Morton terminated Walters, the two became competitors.[26] Walters' relationship with its employees was terminable as will by either party.[27] Morton thus was "privileged" to contact Walters' current and former employees and to solicit their services as long as its means were not wrongful, its motive was, at least in part, to advance its interests relative to Walters; and its actions did not create or continue a restraint of trade. Restatement (2d) of Torts, Sections 766-768; *Frank* vs. *Kraft,* Case No. 79-C-26 (E.D. Wis. April 1, 1980); *Pure Milk Products Co-Op* vs. *NFO,* 64 Wis.2d 241, 219 N.W.2d 564 (1974).

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[26] There is no allegation that Morton solicited Walters' employees prior to its termination of Walters. See *American Republic Ins. Co.* v. *Union Fidelity Life Ins. Co.,* 470 F.2d 820 (9th Cir. 1972).

[27] Tortious interference in contracts terminable at will is scrutinized less strictly than in contracts for a fixed term, in part because no expectancy of continuing employment exists. See *National Oil Co.* v. *Phillips Petroleum Company,* 265 F.Supp. 320 (W.D. Wis. 1966).

Walters has provided no evidence of any wrongful means employed by Morton except for its conclusory statement that the conduct of certain employees became unacceptable after Morton's termination and that some of these employees were hired by Morton after being fired by Walters. Walters has presented nothing to promote the inference that Morton caused the disruptive behavior of any employees. To the contrary, Morton wrote to Walters requesting recommendations of several employees and specifically asked whether Walters would object to their being hired by Morton. Walters has also produced no facts showing Morton's total and sole motive was to lessen competition, See Restatement (2d) of Torts, Section 768 (d), or that trade was indeed restrained as a result of such contact. Morton thus should be entitled to summary judgment as to this claim.[28]

GOOD FAITH/FAIR DEALING

Walters contends that Morton violated its duty of good faith to Walters primarily by overcharging Walters for materials, limiting and encroaching upon Walters' territories, and controlling Walters' retail prices. Morton's responsibility in this regard is claimed to stem from Wisconsin's implied contractual duty of good faith as well as that of the Uniform Commercial Code.[29] Because neither

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[28] Walters has included in its brief other instances of alleged unfair competition not raised in its complaint. Because the allegations are merely conclusory statements with no evidentiary support, they need not be discussed here.

[29] Section 402.203, Wis. Stats. provides that "[e]very contract or duty within Chapters 401 to 409 imposes an obligation of good faith in its performance or enforcement."

of these doctrines applies to the factual situation presented in this case, Morton's motion for summary judgment as to this claim should be granted.

Morton claims that Walters cannot now rely on the provisions of the Uniform Commercial Code, where it chose not to specifically do so in its amended complaint. Even if Walters had specifically alleged a violation of Section 401.203, Wis. Stats., that section only applies to transactions falling within Chapters 401-409 of the Wisconsin Statutes. Of these, the only chapter within which the instant facts could conceivably fall is Chapter 402, Sales. Section 402.201, Wis. Stats., however, requires the existence of a written contract. Walters claims that Morton initially sent it a letter delineating the parties' relationship. Even if the letter would constitute a contract for the purposes of Chapter 402, Walters has been unable to produce it for the court's inspection.[30]

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[30] Walters has referred the court to *Zapatha* v. *Dairy Mart, Inc.*, 408 N.E.2d 1370 (Mass. 1980), in which the Uniform Commercial Code's good faith standard was applied to the termination of a franchise agreement. As discussed previously, Morton and Walters did not, unlike *Zapatha*, have a franchise relationship as that term is generally used. Further, the court in *Zapatha* found that no violation of good faith definition provided by the Code (Section 402.103(1)(b), Wis. Stats.) existed where the franchisor had acted honestly, although arbitrarily, and the franchisee had provided no evidence of commercial standards of fair dealing. The same is true in the present case.

The other case relied on by Walters, *Corenswet, Inc.* v. *Amana Refrigeration, Inc.*, 594 F.2d 129 (5th Cir. 1979), cert. denied 444 U.S. 938 (1979), chose to follow the common law as it relates to the termination of distributor contracts rather than to apply the Code's good faith provision. The court noted that analysis of the agreement's unconscionability under the Code would be a better approach than questioning the good faith of the parties.

Since the Uniform Commercial Code is inapplicable, the question becomes whether Morton had a contractual duty of good faith under the Wisconsin common law. Contrary to Walters' assertion, Wisconsin has not extended a duty of good faith to all contracts, but has recognized such responsibility only in the context of certain fiduciary relationships.[31] The majority of Wisconsin cases discussing the duty of good faith have done so in the context of the relationship between an insurer and its insured or a third party. See *Loy* vs. *Bunderson*, 107 Wis.2d 400, 428, 320 N.W.2d 175 (1982); *Kranzush* vs. *Badger State Mutual Casualty Co.*, 103 Wis.2d 56, 63, 307 N.W.2d 256 (1981); *Anderson* vs. *Continental Ins. Co.*, 85 Wis.2d 675, 680, 271 N.W.2d 308 (1978); *Alt* vs. *American Family Mutual Ins. Co.*, 71 Wis.2d 340, 348, 237 N.W.2d 706 (1976). The court in these cases recognized that when an insurer acts in bad faith, it breaches the "fiduciary duty" imposed upon it by virtue of the insurance contract. See *Anderson, supra*, 85 Wis.2d at 689; *Alt, supra*, 71 Wis.2d at 348. While some of these cases have referred to the concept of contractual good faith embodied in the Restatement (2d) of Contracts,[32] the court never expressly adopted its provisions as applicable to contracts out of the insurance realm.

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[31] While this conclusion was sought by Morton, it should be noted that Morton's reliance on *Rossow Oil Co.* v. *Heiman*, 72 Wis.2d 696, 242 N.W.2d 176 (1976) for the proposition that the good faith requirement does not exist in non-fiduciary dealership relationships is incorrect. Nowhere in the *Rossow* opinion does the court expressly state that a fiduciary relationship is required for the doctrine to come into play. *Rossow* refused to allow a defense of a lack of good faith to enter into summary eviction proceedings.

[32] Section 231 of the Restatement provides that "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement."

The other Wisconsin case relied on by Walters, *Estate of Chayka,* 47 Wis.2d 102, 176 N.W.2d 561 (1970), while recognizing the existence of a duty of good faith, analyzed such duty in terms of the responsibilities owed by spouses stemming from the creation of joint wills. No other case was found which extended the concept beyond circumstances revealing a fiduciary relationship. Absent a clear expression by the Wisconsin Supreme Court to the contrary, it must be assumed that the courts intended the doctrine to be limited to parties in such fiduciary capacities.

Walters relies on *Photovest, supra* and *Arnott, supra,* for the proposition that the duty of good faith extends to the instant situation. These cases, however, are distinguishable. Prior to *Photovest,* the California courts, unlike Wisconsin, had expressly and repeatedly applied the good faith doctrine to non-insurance cases, including franchise agreements. Further, the parties in *Photovest* had a written contract of a fixed and limited duration, which covered their activities. The letter relied on by Walters as the parties' "contract" has not been presented to the court and, in any event, contained no provisions for termination. In addition, the franchisor in *Photovest* misrepresented its actions to the franchisee. No evidence exists in this case of any material misrepresentations by Morton.

In *Arnott supra,* the court found that a fiduciary relationship existed between the defendant oil company and its service station franchisee. In contrast, no fiduciary relationship exists in this case. The parties were not involved in a typical franchise relationship. In addition, Walters has submitted nothing to suggest that their relationship was the result of unequal information or bargaining power. That Morton possesses sizeable economic power

in the assembled-building market does not imply that it possessed such power over Walters as regards their own business relationship. Walters' own economic power is demonstrated by its ability to quickly draw a profit from the marketing of its own buildings. Since no fiduciary relationship exists, no duty of good faith and fair dealing was imposed upon Morton,[33] and its motion should be granted as to this claim.

PREDATORY SCHEME

Walters contends that, even if Morton's activities do not constitute illegal tying, price, territorial or related restraints, the totality of Morton's actions, including its wholesale price increases,[34] constitutes a predatory scheme to force Walters and the other independent dealers out of business. It is true that practices which are not unlawful in isolation may, when combined with a predatory purpose, constitute an illegal restraint of trade. See *Coleman* vs. *Chrysler Corp.*, 525 F.2d 1338 (3rd Cir. 1975). Further, a scheme to force independent dealers out of business pursuant to a plan of vertical integration may be a violation of Section 1 of the Sherman Act.

An issue of fact appears to exist as to Morton's intent in imposing its restrictions. *Photovest, supra,* 606 F.2d at 726. For a violation of Section 1 of the Sherman Act to occur, however, a contract, combination or conspiracy

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[33] Because of this conclusion the court need not determine if an issue of fact exists as to whether any duty of good faith had been breached by Morton. The materials submitted by Walters, however, do not appear to show any actions taken by Morton which showed any significant lack of fair dealing and adherence to proper standards on the part of Morton.

[34] Walters concedes in its brief that the increasing of wholesale prices in and of itself does not violate the Sherman Act.

must exist. Walters' position that a "combination" arose as a result of Walters' unwilling compliance with Morton's policies is unpersuasive. Facing a similar argument the court in *H. & B. Equipment Co., Inc., supra,* 577 F.2d at 243, held that a party cannot be considered to agree (or comply) with another that it will be driven to "financial ruin." The same rationale appears sound in this case.

Walters also contends that Morton colluded with its materials suppliers, which would not sell directly to Walters. Their involvement, however, is not alleged in the context of a "combination" in a broad predatory sense but only in the context of Walters' tying claim which does not lie because of the absence of two products. Because of the lack of a contract, combination or conspiracy as to the predatory scheme, Morton's motion should be granted as to this claim.

TERRITORIAL RESTRICTIONS

Morton bases this portion of its summary judgment motion on the argument that the entire question of the territorial restrictions must be viewed in light of its policy not to ship building packages to job-sites outside of a dealer's territory. It argues that this policy does not violate the law. It then argues that Walters economically could not and would not do business with a customer outside of its territory, since the added cost of shipping the materials from Walters' office to the job-site was too high. Morton argues that, if the non-shipment policy does not violate the law, it follows that all of its other policies and practices as to territory are irrelevant.

While the foregoing argument would appear to be valid, the underlying assumption is invalid. Morton argues that the non-shipment policy is a mere unilateral refusal to

deal without more and thus is legitimatized under the doctrine of *United States* vs. *Colgate & Co.*, 250 U.S. 300 (1919). It is apparent from the record, however, that the sole purpose of the non-shipment policy was to enforce the territorial restriction on the dealers. Thus the question is whether the territorial restriction can be characterized as a mere refusal to deal without more. That is not possible. It is a vertical non-price restriction subject to analysis under the rule of reason. *Continental T.V.* vs. *G.T.E. Sylvania*, 433 U.S. 36 (1977). Morton does not ask the court to rule as a matter of law upon such rule of reason application to Morton's territorial restrictions.

It should be noted that, in its brief, Walters argues in a footnote that, since Morton uses a dual distribution system, the territorial restrictions amount to horizontal restrictions and thus are *per se* illegal. The better-reasoned decisions have held that a rule of reason analysis is applicable in dual distribution systems. *Krehl* vs. *Baskin-Robbins Ice Cream Co.*, 664 F.2d 1348 (9th Cir. 1982); *Abadir & Co.* vs. *First Mississippi Corp.*, 651 F.2d 422 (5th Cir. 1981).

Thus, Walters is entitled to trial on its claim that Morton violated Section 1 of the Sherman Act by its illegal territorial restrictions. As conceded by Morton, the "contract, combination or conspiracy" requirement of Section 1 of the Sherman Act is met by a dealer's acquiescence in its manufacturer's vertical restriction. *Albrecht* vs. *Herald Co.*, 390 U.S. 145 (1968); *United States* vs. *Parke Davis & Co.*, 362 U.S. 29 (1960); *Lessig* vs. *Tidewater Oil Co.*, 327 F.2d 459, 464 (9th Cir. 1964); *Osborn* vs. *Sinclair Refining Co.*, 324 F.2d 566 (4th Cir. 1963). It is also clear in this case that Walters was not terminated as a dealer by Morton for anything having to do with territorial restrictions.

Walters was terminated, because it was going to sell its own line of building packages in addition to the Morton line. Therefore, the damage issue on the territorial restraints should be limited to those damages allegedly suffered by Walters prior to its termination. Walters apparently will attempt to do this by expert testimony. *See e.g., H. & B. Equipmental Co., Inc.,* vs. *International Harvester,* 577 F.2d 239 (5th Cir. 1978).

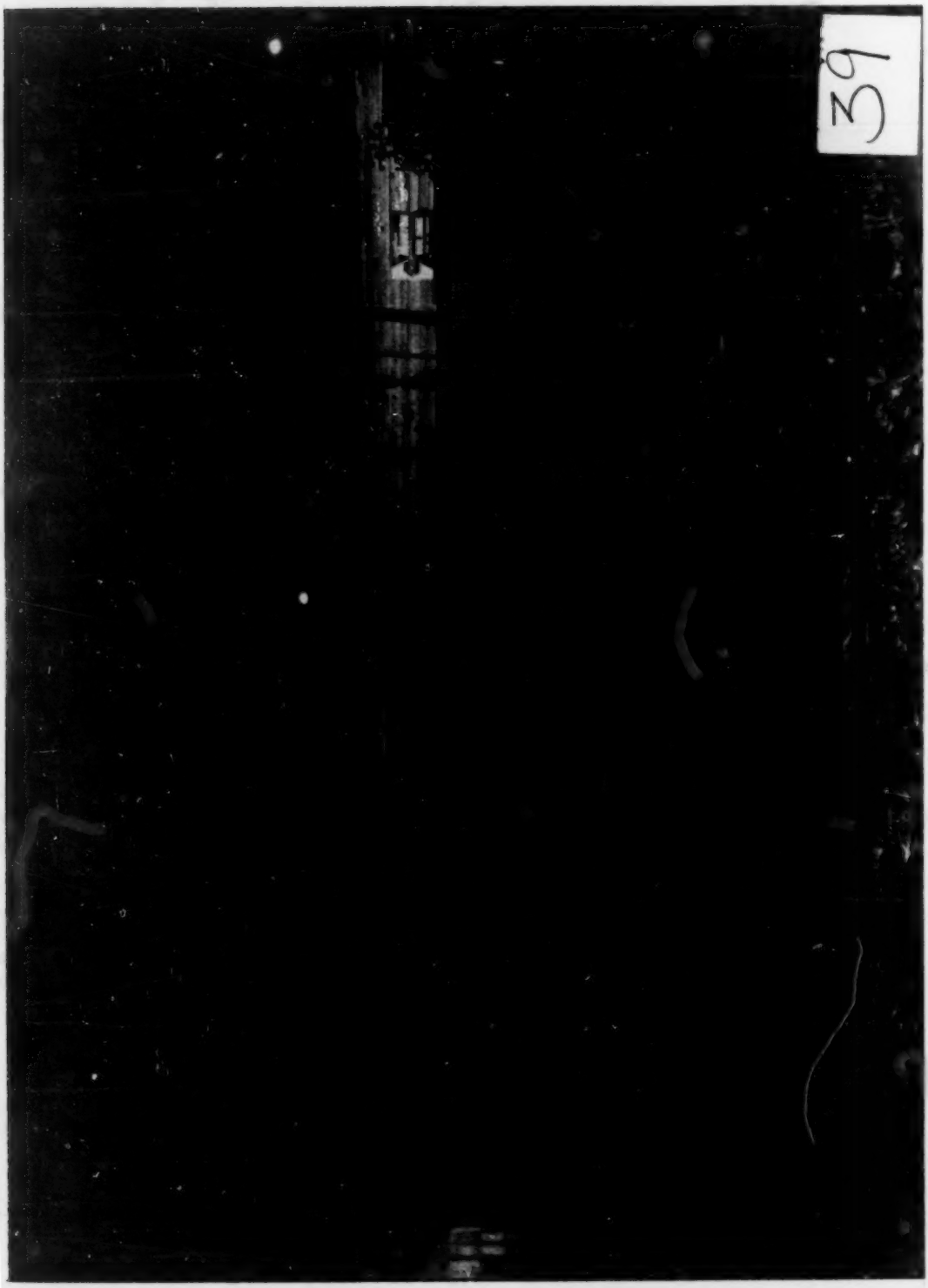
CONCLUSION

For the foregoing reasons, Morton's motion for summary judgment should be granted as to Walters' second, third, fourth and fifth claims in Walters' amended complaint and as to all portions of the first claim except those portions pertaining to the alleged territorial restrictions. It is recommended that the court enter the order attached to this report.

Dated at Milwaukee, Wisconsin this 29th day of October, 1982.

/s/ Bruce C. O'Neill
BRUCE C. O'NEILL
Special Master

P.O. Address:
622 North Water Street
Milwaukee, WI 53202
(414) 273-3939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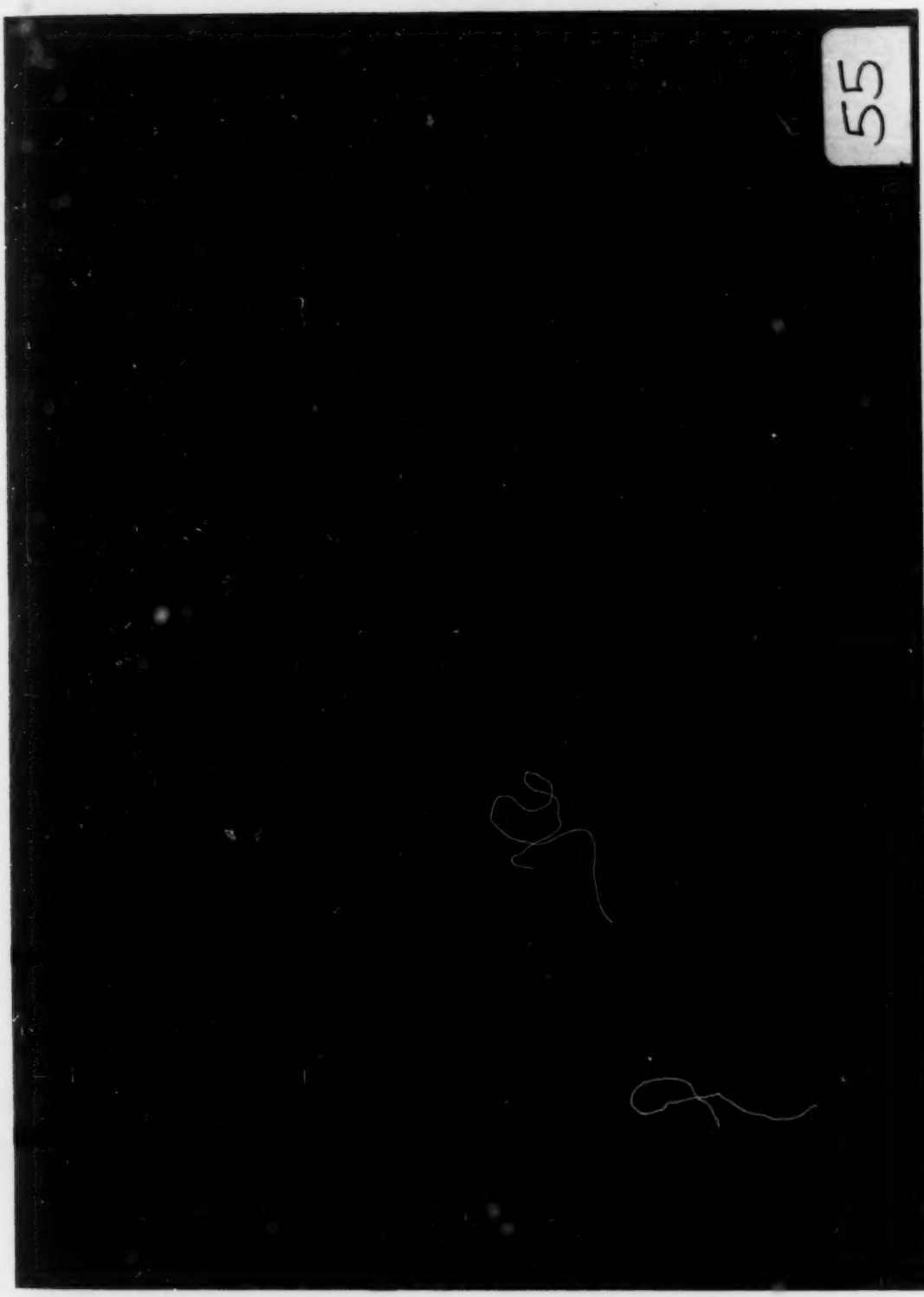
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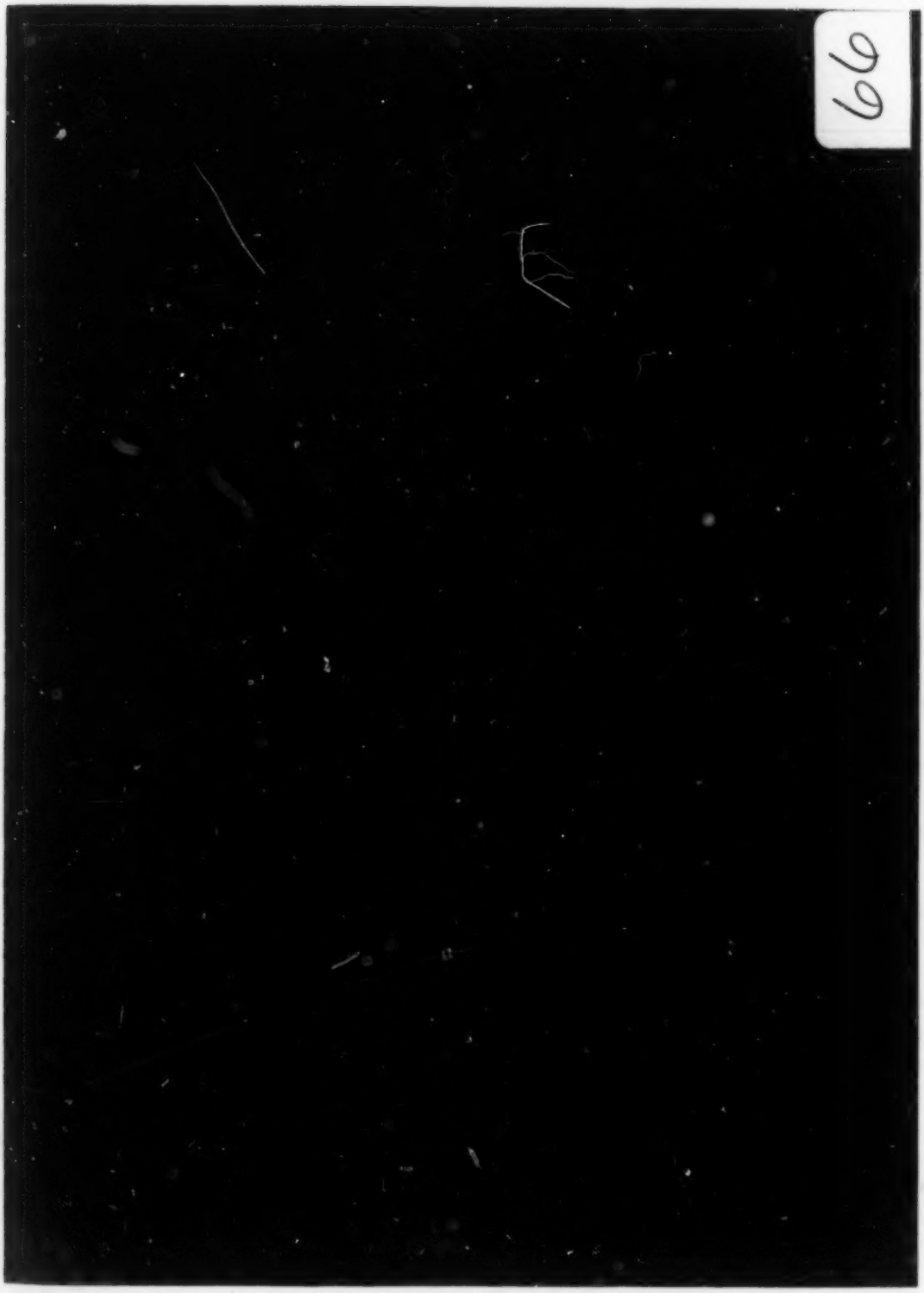

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No. 84-405

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JACK WALTERS & SONS CORPORATION,

Petitioner,

vs.

MORTON BUILDINGS, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

RICKARD T. O'NEIL
Counsel of Record
SUSAN R. ROBERTSON
MICHAEL, BEST & FRIEDRICH
250 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
(414) 271-6560

MYRON L. CAUBLE, JR.
5415 North Idlewild Avenue
Milwaukee, Wisconsin 53217
(414) 332-9542
Attorneys for Respondent
Morton Buildings, Inc.

Pandick Midwest, Inc., Chicago • 454-7600

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QUESTIONS PRESENTED FOR REVIEW

Morton Buildings, Inc., sold Morton Building packages to Walters who, as a dealer in Morton Buildings, resold and erected such buildings. Morton also had its own Sales Offices through which it sold and erected such buildings.

1. Is the name Morton Building a product separate from the building package produced and sold by Morton Buildings, Inc. when that name identifies that building package and has never been sold or marketed separately from that building package?
2. Does Walters, who believed he would encounter customer resentment if he did not sell the Morton Building at the price advertised by Morton Buildings, Inc. to the public, have a compensable antitrust injury?
3. Was the dismissal of an "aggregation of restraints" claim consisting of tying, resale price maintenance, and territorial restrictions correct when the first two were not unlawful and the third was left for trial?

THE PARTIES

The caption of the case contains the name of all parties. Morton Buildings, Inc., has no parent, subsidiary, or affiliated corporations.

TABLE OF CONTENTS

	PAGE
Questions Presented for Review	i
The Parties	ii
Table of Authorities	iv
Statement of the Case	1
Basis for the Petition	1
Statement of Facts	2
Summary of Argument	15
Argument	
I. The Seventh Circuit Properly Applied Jefferson Parish To Conclude That Morton's Name Is Not A Separate Product From the Building It Identifies	17
II. The Seventh Circuit's Decision On Resale Price Fixing Follows Supreme Court Precedent And Presents No Issue Which Merits Supreme Court Review	22
III. Walters' Argument On "Aggregation Of Trade Restraints" Shows No Conflict with Supreme Court Precedent And Does Not Merit Review	24
Conclusion	29

TABLE OF AUTHORITIES

Cases

	PAGE
Albrecht v. *Herald Co.*, 390 U.S. 145 (1968)	22, 27
American Tobacco Co. v. *United States*, 328 U.S. 781 (1946)	27
Brunswick Corp. v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977)	23, 26, 28
Coleman Motor Company v. *Chrysler Corporation*, 525 F.2d 1338 (3rd Cir. 1975)	26
Continental T.V., Inc. v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977)	22
Copperweld Corp. v. *Independence Tube Corp.*, 104 S.Ct. 2731 (1984)	28
H & B Equipment Co., Inc. v. *International Harvester Co.*, 577 F.2d 239 (5th Cir. 1978)	27
Harold Friedman, Inc. v. *Kroger Co.*, 581 F.2d 1068 (3d Cir. 1978)	27
Hyde v. *Jefferson Parish Hospital District No. 2*, 686 F.2d 286 (5th Cir. 1982)	18
Jack Walters & Sons Corp. v. *Morton Buildings, Inc.*, 737 F.2d 698 (2d Cir. 1984)	1, 19, 25
Jefferson Parish Hospital District No. 2 v. *Hyde*, 104 S.Ct. 1551 (1984)	17, 18, 21
Monsanto Co. v. *Spray-Rite Service Corp.*, 104 S.Ct. 1464 (1984)	22, 27
Photovest Corp. v. *Fotomat Corp.*, 606 F.2d 704, (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980)	19
Siegel v. *Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972)	17, 18, 19, 21

PAGE

Susser v. *Carvel Corp.*, 332 F.2d 505 (2d Cir. 1964), *cert. dismissed*, 381 U.S. 125 (1965) 18, 19

Timken Roller Bearing Co. v. *United States*, 341 U.S. 593 (1951) 25

United States v. *Sealy, Inc.*, 388 U.S. 350 (1967) ... 25

Statutes

15 U.S.C. § 1 ..... 21, 24, 26, 27

Opinion Below

Jack Walters & Sons, Corp. v. *Morton Buildings, Inc.*, 737 F.2d 698 (7th Cir. 1984)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JACK WALTERS & SONS CORPORATION,

Petitioner,

vs.

MORTON BUILDINGS, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Statement of the Case

Basis for the Petition

The petitioner Jack Walters & Sons Corporation (hereafter "Walters") seeks review by petition for certiorari of the decision by the United States Court of Appeals for the Seventh Circuit in the case of *Jack Walters & Sons Corporation v. Morton Buildings, Inc.*, 737 F.2d 698 (7th Cir. 1984).

Although nowhere specified in its petition, the only apparent basis upon which Walters seeks review is that the Seventh Circuit decision conflicts with applicable decisions of this Court and, accordingly, that the petition should be granted under Rule 17.1(c) of the United States Supreme Court Rules.

Respondent Morton Buildings, Inc. ("Morton") contends that the Seventh Circuit did not disregard applicable precedent, but faithfully adhered to the decisions of this Court, properly applied them in a manner consistent with other circuits to the undisputed facts of record, and properly affirmed the trial court's dismissal of three of Walters' antitrust claims. (The Seventh Circuit also affirmed the dismissal of a fourth claim which arose solely under state law and is not, therefore, an appropriate subject for review in this Court.)

Statement of Facts

The following statement of facts is, with minor variations, identical to that stated in Morton's Brief to the Seventh Circuit, but it omits references to the record. It does contain references to Appendices A and B filed by Morton with this Brief in Opposition.

The Parties

Defendant Morton Buildings, Inc. ("Morton") is headquartered in Morton, Illinois. (Amended Complaint, ¶ 2, App. A-1 to A-2). It markets and sells under the Morton name, trademark, and logos materials, parts, and components which are assembled as complete buildings primarily for use by farmers. (Amended Complaint, ¶ 7, App. A-3). Prior to 1978, plaintiff Jack Walters & Sons Corp. ("Walters") was a Wisconsin dealer in Morton Buildings. (Amended Complaint, ¶ 9 & ¶ 12, App. A-3 to A-5). Walters purchased Morton Buildings from Morton and resold them to farmers and other customers. (Amended Complaint ¶ 12, App. A-4 to A-5).

Some of the prominent names in this case are Henry Getz, president and a principal of defendant Morton Buildings, Inc.; Jack Walters, president and founder of the plaintiff Jack Walters and Sons Corp.; and his sons James (Jim) and William (Bill) Walters, principals of the plaintiff.

Morton has several manufacturing plants. The first one is located in Morton, Illinois, where the company's offices are located. It has established other manufacturing plants at Spencer, Iowa; Kenton, Ohio; Winfield, Kansas; and Goodfield, Illinois. (Getz 1978 Aff. Exh. A-1, App. B-12).

Original Use of the name "Morton Buildings"

In 1949 while he was working for Interlocking Fence Company (now known as Morton Building Inc.) Henry Getz was looking for a product and came up with the idea of a packaged farm building which would combine steel with a wood frame. In that year packaged farm buildings were added to Interlocking's product line. Later, packaged farm buildings of the pole type were added.

By 1953, Interlocking was offering a building package known as a Morton Building consisting of all the material (except for foundation materials) for a laminated arch building. (Getz Ex. 28, Interlocking Golden Anniversary Catalog, p. 37, App. B-1 and B-4). The name "Morton Building" was used by Interlocking at least as early as 1953, first to describe Interlocking's laminated arch building package and later, around 1957, to describe its pole building package.

Since at least 1960, Morton has marketed and sold, under the Morton name, trademarks and logos, materials, parts and components which are assembled as complete buildings for farm, commercial and industrial use ("Morton Buildings"). The ultimate purchasers of said buildings are usually farmers; said buildings are normally used, *e.g.*, for storage or animal shelter. (Amended Complaint, ¶ 7, App. A-3).

Catalogs and flyers from the '50's and early '60's show trucks loaded with Morton Building packages bearing signs stating "Another Morton Building—Interlocking Fence Company, Morton, Illinois." (Getz Ex. 28, Interlocking Golden Anniversary Catalog, p.37, App. B-4). These early catalogs and flyers also contained statements from owners that they had built their own Morton Building. (Getz Ex. 28, Interlocking

Golden Anniversary Catalog, p.36, App. B-3). Such buildings were advertised as easily erected. (*Id.* p. 35, App. B-2). During that time, the buildings were actually erected by the owner, by a contractor hired by the owner, or by a local contractor hired by Interlocking. In the early 1960's the Morton Building package was advertised for sale as either erected or for customer erection. (See, *e.g.*, Getz. Ex. 29, 1961 Interlocking Fence Supply Catalog, p. 48, App. B-10).

Interlocking changed its name to Morton Buildings, Inc. around 1965. Prior to 1965 no enterprise, not even the defendant, used the name Morton Buildings to describe itself. That name was applied to the building package sold by Interlocking Fence Co.

The Morton Building

At all its plants, except Goodfield, Illinois, Morton manufactures, assembles, and ships a pre-packaged post-frame building which is a pre-packaged group of components and materials that is ultimately built and assembled in the field. A post-frame building is one which uses posts (instead of poles) as the main vertical support. The posts in a Morton Building are made of wood and have a square shape (6″ x 6″) when viewed from the end. The posts are sunk into the ground and anchored in a concrete mix (called "sacrete") which has been poured dry into the hole and which absorbs ground moisture to harden. There need not be any other foundation for the building nor need there be any floor. Because they are to be sunk into the ground, the square posts are specially treated with a preservative and inspected. The exterior sides and roof of the building are made of pieces of steel sheet cut to custom lengths and then rolled and ribbed by Morton according to its own exclusive design. Trusses, which are triangles constructed of various pieces of lumber and manufactured by Morton, are secured at their ends to the tops of the posts and span the interior of the structure. Trusses are the main support for the roof. Pieces of lumber, known as side nailers (2 x 6's), are nailed horizontally to the

exterior surfaces of the vertical posts. Pieces of lumber, known as purlins (2 x 4's), are nailed across (at right angles to) the trusses. The steel siding and roof is then nailed to the side nailers and to the purlins and thus the roof and siding are secured to the building. The building is also trimmed with steel. Boards (2 x 8's) known as "splashboards" are also secured along the lower portions of the interior to protect the steel from splashes, dents, or other possible harm from within the building. Splashboards are also treated with a preservative. Other lumber, generally of common dimensions, such as 2 x 4's or 2 x 6's, are used for various auxiliary and strengthening purposes, such as bracing the trusses ("knee braces and truss ties"), the corners ("corner braces"), and the doors ("door braces"). In addition to the above items, Morton Buildings have hardware and may have large sliding doors (made of the same steel as the siding and roofing). A Morton Building could also have, if ordered by the customer, smaller doors called walk doors, overhead doors (i.e., garage type), and even windows, skylights, or insulation.

Standard buildings were listed in the Morton computer with a prepared material list. Farmers, who are the primary customers, have options that vary from the standard building. Some of the options are sizes and locations of doors and windows. Other options are available both in the exterior and interior. Basically, however, all Morton buildings stem from the basic building.

In fact, during the period 1974-1978, according to Walters' accounting expert witness, i.e., Arthur Andersen & Co., the proportions of various materials did not vary much from building to building. For all buildings purchased by Walters from Morton, the percentages of the following materials within the buildings remained fairly constant: steel siding, roofing, and trim (43.3%); pre-cut lumber (*e.g.*, trusses) (21.7%); dimension lumber (*e.g.*, purlins and nailers) (16.5%); treated lumber (*e.g.*, square posts and splashboards) (13.8%); and the other

items (*e.g.*, windows, doors, nails, insulations, hardware, and sacrete) (4.7%).

The Morton Building Package

The Morton Building package is physically different from delivery of separate components. Walters would receive, usually at the jobsite, a flatbed truck loaded with the components necessary to erect a building.[1] Primarily, Walters sold buildings as package buildings and buildings were, with very few exceptions, ordered from Morton as package buildings.

Although some erectors of farm buildings do purchase truckloads of individual components from suppliers (*e.g.*, a truckload of trusses or a truckload of windows) and then sort out the material and erect the building, others purchase complete building packages (*e.g.*, a truckload with the materials needed for a particular job) from suppliers who provide the package option. For a builder there are definite advantages to the package purchase, *i.e.*, having the entire package delivered by truck to the jobsite. A builder would be willing to pay a premium to avoid the necessity of preparing such packages on his own. A former independent dealer for Walters indicated he was willing to pay a 5% premium for a building package.

By the mid-fifties, Interlocking was manufacturing flashings, trusses, steel, and some hardware for its building.

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[1] After termination Walters purchased truckloads of components rather than purchasing building packages. It would take delivery, for example, of a truckload of doors or a truckload of lumber, etc., at its Allenton, Wisconsin office. It would then reload these materials onto flatbed trucks in such a manner that all the components necessary to deliver what Walters' employees called a "total building" would be on one truck (unless the building is so large as to require more than one flatbed, in which case several trucks would be used). Walters' Corporate Procedures Manual, p. 16, which instructs its own sales offices as to how to order a "Walters Building" for delivery to the jobsite and Walters' sales brochure shows a Walters' load with "Another Walters Building" sign.

Since at least 1953, the Morton Building package has included all the materials for the basic building shell and structure. By 1953, Interlocking furnished all materials (except the foundation) for the Morton Building, then of the laminated arch design. In 1957, Interlocking introduced its pole frame building version of the Morton Building package. This package also included all the materials for the basic building shell and structure, i.e., primary and secondary framing (poles, trusses, nailers, purlins, bracers, headers and truss ties), exterior covering (siding, roofing, and trim, then made of wood), hardware and nails. (The inclusion of these items made the Morton Building package similar to what is recognized in the metal building industry as a "metal building system".) If the plan for the building called for it, the package included insulation, windows, and doors. If the customer desired doors or windows which were not called for in the plans, those doors and windows could be ordered from Interlocking, provided the desired doors and windows were of a type for which there was sufficient demand to include them in the price list.

In 1961 and 1962 Interlocking was advertising "Complete materials, plans, and erection instructions are included" for Morton Buildings. (See, *e.g.*, Getz Ex. 29, 1961 Interlocking Farm Supply Catalog, p. 48, App. B-10).

Producing the Morton Building Package

Morton purchases lumber and coils of sheet steel from various suppliers. At its plants Morton manufactures the trusses; cuts and roll-forms the steel sheet into custom lengths of its exclusive design (known as "Morton Hi-Rib") for the roof, the siding, and large sliding doors; forms the same sheet into metal trim items; and cuts lumber for some braces and some door frames. [According to Walters' accounting expert, the direct cost to Morton of these items (*i.e.*, steel and trim (43.3%) and pre-cut lumber including trusses (21.7%)) represents 65% of Morton's total direct cost for the package. Direct cost here

includes only cost of material, direct labor, and freight to Morton's plant.]

The Morton Hi-Rib steel sheet was developed and introduced by Interlocking in the 1950's. It was designed to be superior in preventing leaks and was produced by Interlocking with its own roll-forming machine. This was an innovation in pole frame buildings and even today only one or two other competitors roll-form their steel siding and roofing. The Hi-Rib design is still used only on Morton Buildings. Colored steel on the Morton Building was introduced by Interlocking around 1959. Interlocking was the first to use colored steel on a wood frame building, although others have followed.

Morton also regularly purchases from selected suppliers, and inventories, items which are included in the building package. Among such items are nailers and purlins and other dimension lumber. (Dimension lumber represents 16.5% of Morton's direct cost of the package.) Also among such items are the square posts and splashboards. This lumber is specially treated with a preservative. (Treated lumber represents 13.8% of Morton's direct cost of the package.)

Square posts were introduced by Interlocking around 1958 in an attempt to obtain straight, well-aligned sides similar to those of steel frame buildings and to provide more nailing surface and thus stronger connection with other parts. The purpose of preserving the posts is to make Morton's posts last longer. While some others have followed Morton's retention standard, Morton has always attempted to treat its posts with more preservative than the competition and to make a greater effort at inspection. Posts are also anchored in concrete rather than rested on a pad. This is intended to prevent lifting by wind.

Also included in the package are nails and hardware. Morton also regularly inventories certain other items which may be added to, or substituted within, the package, *e.g.*,

certain brands and sizes of overhead (garage type) and walk doors, skylights, and insulation. (These last items plus the nails, hardware, and sacrete represent 4.7% of Morton's total direct cost of the package.) Some of these last items are manufactured by Morton, at its Goodfield plant. These manufactured items include sheet metal items, plates for trusses, and certain hardware. At Goodfield, Morton also welds and does fabricating on steel beams for overhead door headers. The balance of this category is purchased elsewhere.

Although the items within this last ("Other") category represent only 4.7% of Morton's direct cost of the building package, Morton has worked with suppliers to improve the quality of these materials and to improve their fit within the building. These efforts have included attempts to develop overhead doors specially designed to fit Morton Buildings and to develop better insulation. One of the major purposes of all of Morton's design changes over the years has been to simplify the erection process and to make the entire package fit better.

The Contents of the Building Package

"The business of Walters as a Morton dealer consists of selling Morton Buildings to farmers and other customers, and then purchasing from Morton all of the materials and components required to construct the building". "Walters' business also involves ordering all of the components required for a customer's building from Morton and then, with its crews, erecting the customer's building on its premises from the components in accordance with directions and instructions which Morton has conveyed to Walters over the years." (Amend. Complaint ¶ 12, App. A-4 to A-5). The package would generally include all the materials necessary to erect a Morton Building and Jack Walters testified that Walters purchased all of its materials from Morton. When a farmer erected the building himself, he received a complete package for a standard building or whatever type of building was ordered.

In response to a particular order received at one of the plants, the materials necessary to erect the basic structure and shell of the particular Morton Building ordered by the farmer or other ultimate user are loaded onto one or more trucks and shipped to the erection site. These materials included the correct amount or number of nails; posts; side nailers and purlins; Morton Hi-Rib steel, cut into custom lengths for the siding, roof, and sliding doors (unless different doors were ordered and available from Morton); trusses; hardware; insulation, if ordered and of a type inventoried by Morton; Morton signs or logos; plus a material list and plans for erection and any other materials necessary to erect the basic structure and shell of the particular Morton Building.

Although Morton generally attempted to sell a package for a complete building,[2] there were certain nontypical buildings for which Morton did not supply all components. There were two story dairy barns, some commercial buildings, and stud type (not pole) confinement buildings for which Morton did not supply all the materials. The two-story dairy barn was "non-typical" and Walters sold few stud type confinement buildings. In 1977 all types of commercial and confinement buildings (stud and pole) represented only 8% and 2%, respectively, of all buildings Walters sold. In the cases of these buildings, Walters obtained the necessary remaining components from other sources, such as subcontractors selected by Walters or by the customer or from other suppliers of equipment or material. The customer himself may have obtained the additional components.

In sum Walters bought a basic shell from Morton and on occasion purchased from other sources certain "collateral items" which were not a part of the "system package".[3] The

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[2] Even Walters' counsel admitted at oral argument in the district court that the package was in many instances complete and Walters'

(Footnote continued on following page)

portions of the basic shell or "building system" which Walters would have to purchase from outside sources for such buildings were limited.[4]

Sales Offices and Dealers

In the early 1960's, Interlocking Fence also began establishing its own retail sales outlets, or sales offices. The number of sales offices increased from the early 1960's until in 1978 the total number of Morton Buildings, Inc. sales offices was approximately seventy-one.

Interlocking was also approached by several individuals or small companies, such as Jack Walters, who requested that they be made dealers in Morton Buildings. Morton never sought any dealers; each approached it and asked to resell the buildings. The maximum number of dealers Morton ever had was six. That number declined until, in mid-1977, Walters was the only remaining dealer.

Jack Walters himself first learned of Morton Buildings in 1962 from a farmer who had erected his own building which was called a "Morton Building" and which probably bore a

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(Footnote continued from preceding page)

expert's report shows that Walters purchased all materials for machine sheds from Morton.

[3] Collateral items included slabs, concrete materials, plate glass windows (if not furnished preglazed), masonry fronts, overhead doors, animal equipment (*e.g.*, hog crates, nipple waterers, heat makeup units, heater units), plumbing, electrical, and interior materials. These "collateral" items would not be part of the "typical" pole building as described in Walters' briefs below.

[4] For the dairy barn such purchases would include thermopane windows, some air vents, pneumatically controlled cow doors, and a walk door. For a commercial building they would include some fire treated wood, some walk doors, some plate glass windows and entrance covers; some commercial trusses, before 1976 or 1977, for state or local code requirements; and perhaps 6 x 8 posts for commercial buildings although they were available through Morton on a special order basis.

"Morton" sign. Jack asked Henry Getz, President of Interlocking Fence, about selling such buildings in Wisconsin and became a dealer.

Morton-Walters Operating Procedure

Before ordering a building Walters would contract with its own customer to sell a Morton building. (Amended Complaint, ¶ 12, App. A-4 to A-5.) Buildings were primarily sold as packages. Walters would then order the building package from Morton. Morton would ship the building package in one or more truckloads directly to Walters' customer's jobsite where it would be erected.

The procedure for the ordering and shipping of a Morton Building was described in The Morton Corporate Procedures Manual, which was distributed both to Morton's Sales Offices and to its dealers. The manual referred to the component packages as "Morton Buildings" and detailed how to order "Morton Buildings".[5] Included in such instructions were directions on how to schedule delivery of "buildings", which terminology referred to the material packages shipped to Walters.

A "very typical" order submitted by Walters to Morton would state the *building* series and model number, dimensions of the buildings, and the color. In an abbreviated form, the order specified all the material for the particular building ordered and it would also specify any doors, skylights, etc.

Walters would usually receive from Morton an acknowledgement of its order. Walters would then inform its customer of the scheduled building delivery date. From 1975 until termination, Walters mailed a certain form to inform its customers of the delivery date. This form read in part: "This is

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[5] After termination, Walters had a parallel practice of selling packages to its own independent dealers which packages were invoiced as a "JWS building" and which included all the components necessary to erect the basic shell.

just a reminder that your *Morton Building* is scheduled for delivery on *(blank)* ." [Emphasis added].

Originally, once at the jobsite, the buildings were erected by the owners or by a local contractor, sometimes called a subcontractor. Later, buildings were erected by crews consisting of a foreman and several other members, all of whom were employees of Jack Walters and Sons. Buildings are still erected by owners. Packages for buildings to be erected by customers include Morton signs. Of course, owner erected Morton Buildings were sold by Walters and were the same Morton Building packages which Walters had purchased from Morton and which was still called "A Morton Building".

Increasing Costs

Through at least 1974 Walters was content with purchasing the Morton Building package from Morton. In 1974, however, Morton made practically no profit at the manufacturing level and all its profit came from its own sales offices. To achieve a better balance between manufacturing profit and sales office profit, Morton, in 1975, increased the wholesale price which it charged to its own sales offices and to its dealers.

It did this by increasing its prices on the building package. But then between 1975 and 1978 the cost of material used in Morton Buildings escalated rapidly. These cost increases were in part passed on in the form of higher wholesale prices to Morton's sales offices and to dealers including Walters. Since only part of the material cost increases were passed on through higher wholesale prices charged by Morton, during this period Morton again suffered a decline in its gross margin. Morton's 1975 price increase returned Morton's gross margin closer to its 1971 level, but after 1975 Morton's gross margin declined again. At the same time as Walters was suffering a retail gross margin squeeze, Morton was also being squeezed by its suppliers. By 1978 Morton's margin was 22.9% and thus had virtually returned to the 1974 margin level of 22.2%.

Morton's actual gross margins on all charges to Walters for the years 1971-78 are set forth below.

1971	1972	1973	1974	1975	1976	1977	1978
25.7%	24.0	19.5	22.2	27.1	25.4	24.3	22.9

The 1974-78 figures are based upon Walters' accounting expert's report.

The Walters Building

Walters' dealership was not consistently profitable. It experienced a loss about once every three years even before Morton's alleged decision to make Walters unprofitable. During 1977, Walters again experienced a loss, this time of $121,200.

In June, July, or August of 1977 Walters considered the costs of the alternative of manufacturing its own building. In August or September of 1977 Walters had discussions with banks over loan applications to secure funds for the production of Walters Buildings.

On October 14, 1977 Walters had a meeting with Henry Getz, president of Morton. In that meeting, Walters indicated a desire to purchase from other sources certain parts of the Morton Building package (*i.e.*, some items which were not manufactured by Morton). At no time did Walters request permission to purchase manufactured items, such as steel, trim, trusses, and other precut lumber from other sources.[6] Walters was satisfied with Morton's steel prices until November or December, 1977.

On October 28, 1977 Walters received its first approval of a loan for construction of a manufacturing plant. In a letter to Morton on January 9, 1978 Walters stated that it intended to manufacture its own building.

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[6] The cost of these items represents about two-thirds of Morton's direct cost of the package. (See discussion, *supra*).

Termination

Simultaneously with introducing its own building, Walters raised its authorized selling price for the Morton Building to 14% above the Morton suggested selling price and introduced its own Walters Building at the Morton suggested selling price. As a result, between Jan. 9, 1978 and Feb. 17, 1978, Walters sold only one Morton Building and forty-two Walters Buildings.

On February 17, 1978, Morton informed Walters it would be terminated, effective June 1, 1978, based upon Morton's understanding that Walters was representing its buildings to be of better quality than Morton's and was offering the Walters Building at a lower price. On March 23, 1978 Walters expressly instructed its salesmen "Effective March 23 we will not offer the Morton Building for sale".

Post-Termination

In its first year of manufacturing and selling its own building package Walters realized an immediate profit by selling the Walters Building instead of the Morton Building. For the 12 months ending February, 1979 Walters had a pre-tax earning of $262,800.

SUMMARY OF ARGUMENT

Walters' petition for certiorari fails to set forth with specificity the grounds for Walters' contention that this case merits Supreme Court review.

Tying: Walters contends that the Seventh Circuit failed to follow this Court's decision in *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 104 S.Ct. 1551 (1984), and to consider whether separate markets exist for the Morton name and the product which the name identifies, i.e. the Morton Building. A review of the Seventh Circuit's decision shows, however, that it did consider *Jefferson Parish;* it also considered and applied several

lower court trademark tying decisions which were referenced in *Jefferson Parish;* and it concluded, based on its application of those cases to the undisputed facts in the record, that a separate market does *not* exist for the Morton trademark and, consequently, that there is no unlawful tie-in of that trademark to the product which the trademark identifies.

Resale price fixing: Walters argues that the Seventh Circuit's decision violates this Court's holding in *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), but, as even Walters' petition notes, the Seventh Circuit did not disregard *Albrecht.* Walters conceded that Morton may lawfully advertise retail prices to consumers and one of Walters' principals testified that Walters felt compelled by pressure from its customers to meet those prices. Based on those concessions the Seventh Circuit properly concluded that Walters suffered no compensable antitrust injury in this case, regardless of any other means which were allegedly employed by Morton to obtain adherence to the advertised prices.

Aggregation of restraints: The term "aggregation of restraints" sheds no light on the antitrust issues. The Seventh Circuit decision does not conflict with any opinion of this Court. The Seventh Circuit rejected two of the three elements of the alleged aggregation; the third remains for trial. The Seventh Circuit even reviewed the aggregation claim under the broad, classic common law definition of a conspiracy and found nothing improper. Walters' aggregation claim is also fatally flawed in its conception of an antitrust conspiracy. The alleged co-conspirators did not have the conscious commitment to a common scheme to harm competition or to eliminate Walters as a dealer or competitor.

ARGUMENT

I.

THE SEVENTH CIRCUIT PROPERLY APPLIED JEFFERSON PARISH TO CONCLUDE THAT MORTON'S NAME IS NOT A SEPARATE PRODUCT FROM THE BUILDING IT IDENTIFIES.

Walters' complaint that the Seventh Circuit failed to follow the teachings of *Jefferson Parish Hospital District No. 2 v. Hyde*, 104 S.Ct. 1551 (1984), is, in reality, nothing more than a disagreement with the Seventh Circuit's application of the principles of *Jefferson Parish* to the extensive record submitted with the summary judgment motion.

Furthermore, the contention that the Seventh Circuit ignored *Jefferson Parish* is incorrect. The Seventh Circuit granted Walters' motion to file a Supplemental Memorandum dealing with the application of *Jefferson Parish* to this case. Also the Seventh Circuit, at 737 F.2d 704-705, did exactly what this Court did in *Jefferson Parish* at 1563, *i.e.* it reviewed prior lower court decisions such as *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1971) *cert. denied*, 405 U.S. 955 (1972), and then extracted and applied the same principles as did this Court in *Jefferson Parish*.

This court in *Jefferson Parish* adopted a two market principle, cited at 1563, n.35, certain lower court opinions as consistent with that principle, and specifically cited the pages of *Chicken Delight* at 448 F.2d 48-49 where that opinion also employs a two market analysis.

The Seventh Circuit extensively discussed the principles of those two cases at 737 F.2d 703-705, where that court specifically refers to both *Jefferson Parish* and *Chicken Delight* at several points. The Seventh Circuit, therefore, discussed and applied the principles of *Jefferson Parish* by discussing and analyzing both *Jefferson Parish* and *Chicken Delight*.

There is nothing startling or devious about the Seventh Circuit's discussion. It does show that the Seventh Circuit did

not, as Walters charges, reject the tying doctrine, but accepted it and analyzed its application to this case.

Furthermore, the Seventh Circuit's decision did *not* conflict with *Jefferson Parish*. *Jefferson Parish* requires that, in order to decide whether two separate products exist, a determination be made whether there are two distinct product markets which have been linked so that, through power in the first, competition in the second distinct market has been foreclosed.

In *Jefferson Parish* a hospital's operating rooms and anesthesiological services were the alleged tying and tied items, respectively. They are rather obviously separate services. Indeed the Court of Appeals in that case noted in its opinion that "[t]he existence of a tying arrangement in this case has never been seriously disputed by appellee." *Hyde v. Jefferson Parish Hospital District No. 2*, 686 F.2d 286, 289 (5th Cir. 1982). The Supreme Court likewise recognized that anesthesiological services are in fact billed separately, are often selected separately, and can unquestionably be provided separately. 104 S.Ct. at 1563.

A product name, however, as the Seventh Circuit said in this case, is not an obviously separate product. A trademark is not a physical product or service but is usually simply the name of something else. As the Seventh Circuit points out, for instance, the name "Buick" is not something which a customer wants or needs or can use separately from a Buick car.

The Seventh Circuit did recognize, however, that, as in *Chicken Delight*, a separate market *may* exist for a name which does not identify a named product, but rather identifies a method of doing business in a prescribed format. (See also *Susser v. Carvel Corp.*, 332 F.2d 505 (2d Cir. 1964), *cert. dismissed* 381 U.S. 125 (1965), also cited in *Jefferson Parish*, 104 S.Ct. at 1563 n.35.) The problem in trademark tying cases is to identify a market (other than the market in which the physical product or service, the tied product, is sold) in which the trademark, the alleged tying product, is sold or marketed.

The trademark becomes a separate product in a separate and distinct market only if and when it is used as a separate product in that separate and distinct market by being bought and sold as something separate and distinct from the tied product.

The Seventh Circuit specifically recognized that a separate market for a trademark may exist and dealt specifically with that issue in this case. *Jack Walters, supra,* at 704-705. The Seventh Circuit also discussed at some length the very language from *Chicken Delight* which is found at 48-49 and was cited with approval by this Court.

On pages 48 and 49, the Ninth Circuit first enunciated the principle that a trademark may become a separate product if it is marketed separately from the product. *Chicken Delight* said consideration must be given to the function of a trademark and referred to the widespread commercial practice of franchising as having developed a new rationale for trademarks where the trademark identifies a method of doing business under a common trademark or tradename. The *Chicken Delight* court was referring to the fact that certain franchises or trademark licenses are bought and sold in a franchise market. This is true of franchises such as *Chicken Delight* or *Photovest* v. *Fotomat Corp.,* 606 F.2d 704, (7th Cir. 1979) *cert. denied* 445 U.S. 917 (1980). Those trademarks are bought and sold like commodities and there exists a separate, distinct market for those franchises.

Chicken Delight, of course, was a franchisor in the business of franchising, which licensed its several hundred franchisees to operate fast-food outlets under a uniform business format and under the Chicken Delight name. Carvel, too, was a food (ice cream) franchisor in the business of licensing 400 franchisees to operate their businesses in a prescribed format, with a prescribed appearance, and under the Carvel name.

Morton, in contrast to Chicken Delight, is not in the business of marketing franchises or trademark licenses. It never separately sold or licensed its name. Indeed, Morton insisted that Walters operate under its own name. Morton has never

even sought dealers and never in its history had more than six dealers. Throughout its history Morton has manufactured and sold Morton Buildings, not trademark licenses.

Neither the farmers who purchased Morton Buildings from Morton or from Walters, nor any of Morton's other dealers. purchased the Morton name as an item separate and apart from the building package. Certainly there would have been no reason for farmers to do so, and Walters, notwithstanding its present contention that it wanted to separate the Morton name from the Morton Building, never asked to purchase a separate license for the Morton name. The same is true of Morton's other dealers. Thus, from the perspective of Morton, its customers, or its dealers, there was no separate market for the Morton name.

Indeed, despite Walters' efforts to establish a custom of separate licensing in the pole building industry in general, the undisputed evidence is that there was no such custom. Of the 20 to 40 pole barn suppliers identified by Walters and its expert, Professor Mueller, only one (Bonanza) was identified as ever having sold its name separately from its buildings and it was different from Morton in other respects. In contrast, Jack Walters and Henry Getz, the presidents of Walters and of Morton, respectively, with their combined 50 years' experience in pole farm buildings, had never heard of the practice of licensing or selling the separate right to use a trademark or tradename.

Walters would require a manufacturer to separate the name of its product from the product itself any time someone else, *e.g.,* a dealer, believed it had a use for the name apart from the product and then allow that dealer to market the product of someone else under the manufacturer's name. This desire does not create a market for the name; it creates fraud. The undisputed facts show that no market for the Morton name exists separate and apart from the market for the "Morton Building".

Therefore, the Seventh Circuit in this case ignored neither the *Jefferson Parish* decision nor the "empirical facts." Accepting *Jefferson Parish*'s mandate that the determination be made whether separate markets exist for the alleged tying and tied products, it did examine the record to determine whether the name "Morton" is more like "Buick" or more like "Chicken Delight." Its conclusion is amply supported by the undisputed facts and accords with *Jefferson Parish*. Accordingly, there being no actual dispute over the governing legal principles, this case is not one that merits review by this Court.

In fact, Walters concedes (Pet. at 14) that, if Morton had obtained any building components it thought appropriate by any means it found appropriate; packaged them in any combination it thought best; and sold the resulting, disassembled aggregation at any price the market would bear as a "Morton Building," there would be no violation of §1 and neither Walters nor anyone else would have the right to buy the Morton name separately. Walters contends, however, that Morton in reality sold a free-standing structure which Walters, not Morton, erected. It is undisputed that Walters erected the building. Its erection function is simply not relevant to separate the Morton trademark from the building or building package which Morton sold to Walters and which was identified by the name Morton Building.

Regarding manufacturing itself, the Seventh Circuit examined the facts in the record and concluded that "the inference that Morton is really engaged in manufacturing buildings is inescapable." 737 F.2d at 705. Indeed, the inference is inescapable, for Morton's manufacturing and fabricating operations of cutting lumber, assembling trusses, and roll-forming steel alone accounted for 65% of Morton's direct cost of materials sold to Walters. But the point on a petition for certiorari is that, although Walters couches its argument in terms of failure to abide by Supreme Court precedent, its real point is not a dispute over law, but over the application of law to undisputed facts.

II.

THE SEVENTH CIRCUIT'S DECISION ON RESALE PRICE FIXING FOLLOWS SUPREME COURT PRECEDENT AND PRESENTS NO ISSUE WHICH MERITS SUPREME COURT REVIEW.

Accusing the Seventh Circuit of making a remarkable departure from existing law, Walters complains that the Seventh Circuit has created a "heretofore unknown exception to the rule against vertical price fixing", Pet. at 17, in order to avoid this Court's decision in *Albrecht v. Herald Co.*, 390 U.S. 145 (1968).

But the Seventh Circuit's discussion of the continuing validity of *Albrecht* is only *dictum*. The Seventh Circuit was simply stating that after *Sylvania* maximum resale price maintenance may be an open question. Such a statement is a candid reflection of this Court's own recognition that at some point it may be called upon to re-examine its prior resale price fixing decisions in light of *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977). See *Monsanto Co. v. Spray-Rite Service Corp.*, 104 S.Ct. 1464, 1469 n.7 (1984). Despite the *dictum*, the Seventh Circuit expressly stated, 737 F.2d at 707, that, as required by *Albrecht*, it was assuming maximum price fixing to be unlawful. Walters cited no other decisions of this Court with which it claims the Seventh Circuit's opinion conflicts. Since there is no conflict between the Seventh Circuit's decision and *Albrecht*, there is no significance to the decision which merits review in this Court.

Rather than ignore *Albrecht*, the Seventh Circuit assumed *Albrecht* was the law and considered several different approaches to Walters' resale price fixing claim. In considering these different approaches the Seventh Circuit considered all those facts which Walters claims were not mentioned in the Seventh Circuit opinion. Alleged policing, threats of termination, and other conduct were specifically discussed by the Seventh Circuit at various places in its opinion. These alleged

facts were simply not important because of other undisputed facts. On the basis of these other undisputed facts alone, the Seventh Circuit's decision is correct.

As Walters' amended complaint says, Morton is in the business of "selling and erecting" farm buildings and has its own sales office in Wisconsin through which it sells directly to farmers and other consumers. (Amended Complaint, ¶ 2, App. A-1 to A-2.) Morton periodically advertised special prices for certain of its buildings in a Wisconsin farmers' magazine. Morton offered to delete Walters' name from the ads, but Jim Walters testified that, even if the ad omitted Walters' name, farmers would want to purchase at the price seen in the ad. Walters in its brief filed in the district court admitted that "[s]ince the ads appeared within the territory served by Walters, as a practical matter, Walters had no choice but to charge the advertised special prices. It is obvious that any deviation from those prices would be met with intense customer resentment."

A manufacturer may advertise its prices directly to its consumers. (This unremarkable proposition was conceded by Walters.) The Seventh Circuit concluded that a distributor who feels compelled by anticipated pressure from its customers to meet those advertised prices has not suffered an antitrust injury. Walters cites no case from any court which contradicts this rather fundamental proposition. Indeed Walters could not cite any such case. This Court's decision in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), controls. Incidentally, the concurring opinion in the Seventh Circuit, 737 F.2d 713, relied exclusively on the *Brunswick* rationale. In *Brunswick*, this Court said at 489: "Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." (Emphasis in original.) The record establishes, and the Seventh Circuit properly concluded in this case, that, whether or not Morton had engaged in any

other conduct which was improper, Walters would have met the prices advertised and no compensable antitrust injury occurred.

At best, despite its dramatization of what the Seventh Circuit has done, Walters is quibbling with the Seventh Circuit's review of the summary judgment materials presented by both parties. There is nothing unusual about the legal issue presented by those materials. The Seventh circuit applied a settled proposition of law to the undisputed facts and did not create an issue worthy of review.

III.

WALTERS' ARGUMENT ON "AGGREGATION OF TRADE RESTRAINTS" SHOWS NO CONFLICT WITH SUPREME COURT PRECEDENT AND DOES NOT MERIT REVIEW.

On this issue, again Walters cites no Supreme Court decision with which the Seventh Circuit decision conflicts. Once again, therefore, there is nothing in Walters' claim or in the Seventh Circuit's decision which merits review by this Court.

Walters' first claim in its amended complaint charges Morton with tying, resale price fixing, and imposition of territorial restraints. Walters also claims that Morton's conduct was designed to drive Walters out of business and in the aggregate constituted a violation of §1 of the Sherman Act. The individual territorial claim was not at issue on the appeal and remains for trial in the district court. The Seventh Circuit properly rejected Walters' individual claims of tying and resale price fixing. Nevertheless, Walters attempts to resurrect those claims for trial under the guise of an "aggregation of trade restraints."

It has cited no Supreme Court authority for this attempt. Certainly, as the Seventh Circuit said, the phrase "aggregation of restraints" adds nothing to this case. The phrase first

appeared in *Timken Roller Bearing Co. v. United States,* 341 U.S. 593 (1951), to describe an agreement providing for horizontal territorial divisions, price fixing, and other practices intended to eliminate all competition among the parties to the agreement. The practices were in and of themselves unlawful *per se.* Similarly, in *United States v. Sealy, Inc.,* 388 U.S. 350 (1967), the phrase was used to describe a horizontal agreement among competitors for territorial division, a goal already declared by the Supreme Court with reference to the same defendants as *per se* unlawful.

Not only does it add nothing to call the alleged restraints an "aggregation", but where two of the three components of an alleged "aggregation" are not unlawful and the third remains for trial, it appears that, as the Seventh Circuit said at 737 F.2d 709, no other part of the alleged unlawful scheme remains.

The Seventh Circuit could have ended its discussion after concluding that the tying and resale price maintenance claims were not valid, but, instead, the court examined the case under the classic and broadest definition of a conspiracy, i.e. unlawful means to a lawful end or lawful means to an unlawful end. As the Seventh Circuit said, "This is a pretty encompassing definition, and if Walters cannot bring itself within either branch it is unlikely to have a cause of action under section 1." *Jack Walters & Sons, Corp., supra,* at 710. The court, therefore, was attempting to provide Walters the fullest opportunity for review.

The court then examined the two branches of the classic definition and concluded that, since (with the exception of territorial restraints) the means, i.e. resale price maintenance and tying, were not unlawful, an unlawful end must be found. The court then correctly concluded that the end, vertical integration or selling directly to farmers, was not itself unlawful.

Vertical integration is not only clearly lawful, as Walters concedes (Pet. at 21), but can be pro-competitive. In addition, as the Seventh Circuit noted, there is no monopoly here and

indeed none is alleged. Since the end was lawful and the means lawful, the Seventh Circuit properly concluded that the so-called aggregation of restraints claim must fail also.

Walters cites *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338 (3rd Cir. 1975), as its principal case on aggregation, but that case is certainly not a basis for granting certiorari. The Seventh Circuit opinion does not conflict with *Coleman*, but rather distinguishes *Coleman* because the means, *i.e.* predatory pricing, were unlawful. Thus, the Seventh Circuit was not in conflict with *Coleman*, but simply considered it inapplicable.

Another fatal flaw in the aggregation claim lies in Walters' conception of a conspiracy. The aggregation claim is a Section 1 claim and, without a conspiracy to do an antitrust injury *a la Brunswick, supra*, the claim must fail. In the Seventh Circuit, Walters emphasized its allegation that Morton sought vertical integration and claimed that Walters and Morton had agreed that Morton would destroy Walters. In this Court, even Walters has chosen not to pursue this self-destruction theory of conspiracy. The Seventh Circuit did not discuss such a nonsensical theory, but treated the aggregation claim more politely by discussing the application of the classic definition of conspiracy to vertical integration as an objective of a conspiracy.

For itself, Walters has now substituted in the conspiracy suppliers of some parts for the Morton Building. These suppliers were Walters' second-string and back-up conspirators in the Seventh Circuit, but have now been promoted to first-string.

The new team will not score either. Walters charged in a footnote in its brief in the district court "that Morton colluded with third party suppliers *to enforce its tie-in restraints*" (emphasis supplied), but did not claim that these suppliers conspired to drive Walters out of business. (The conclusion of the district court that the aggregation claim should be dismissed was based on the failure to allege participation by the suppliers in a broad predatory scheme. See Pet. App. p. 66. The

aggregation claim was called the predatory scheme in the Seventh Circuit and in the district court.) Even assuming, therefore, that the record would support a charge that Morton and certain suppliers agreed to require Walters to purchase all the materials, parts, and components for a Morton Building from Morton, that allegation does not charge a conspiracy to eliminate Walters. Those suppliers do not thereby become co-conspirators in the vertical integration plan or plan to destroy Walters. The suppliers are not even charged with the knowledge of "the essential nature and general scope" of Morton's supposed scheme, *H & B Equipment Co., Inc. v. International Harvester Co.*, 577 F. 2d 239, 245 (5th Cir. 1978). Morton and its suppliers therefore could not have had a "meeting of minds" on the scheme, *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946), and there was no conspiracy.

Furthermore, no conspiracy would exist even if there were a tie-in arrangement. In *Harold Friedman, Inc. v. Kroger Co.*, 581 F.2d 1068 (3rd Cir. 1978), the plaintiff failed to meet the §1 requirement of concerted activity and the court affirmed summary judgment for the defendant. Relying on *Albrecht v. Herald Co., supra,* the court stated that "the party combining with the defendant must have knowledge of the defendant's anticompetitive purpose." *Id.* at 1074. Walters has not even alleged the requisite joint purpose in this case.

Finally, this Court has recently set forth a definition of conspiracy under section 1, stating in *Monsanto Co. v. Spray-Rite Service Corp.*, 104 S.Ct. 1464, 1471 (1984), "that the manufacturer and others 'had a *conscious* commitment to a *common scheme* designed to achieve an unlawful objective'". (Emphasis supplied.) There is nothing in the record to support an allegation (and none has been made) that any suppliers of any of the parts for the Morton Building *consciously committed themselves to a common scheme with Morton to eleminate Walters as a dealer or competitor.*

If, as the Seventh Circuit and the district court concluded, there was no tie-in, then Walters' position becomes even more absurd. With no tie-in, accepting Walters' view means that the suppliers would be antitrust co-conspirators, guilty of participating in a broad-scale conspiracy to destroy Walters, even though the only conduct of which the suppliers had knowledge or in which they participated, *i.e.* preventing Walters from obtaining supplies with which it could have passed off a non-Morton building as a Morton Building, did not violate the antitrust laws.

As this Court has recognized, the antitrust laws are designed for the protection of competition, not an individual competitor. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., supra.* The court in *Coleman, supra,* also stated that damage to an individual's business can not constitute a restraint of trade under §1 even if a combination or conspiracy exists. "An injury to competition in the marketplace" is necessary for a restraint of trade. 525 F.2d at 1346.

Walters' aggregation claim is nothing more than a complaint that Walters was treated poorly by Morton. Walters' opposition to Morton's summary judgment motion was based not on an effect on competition, but on an effect on itself. Indeed, regarding competition, as the Seventh Circuit noted, Walters' whole tie-in claim is premised on the ready availability from other manufacturers of the components which Morton supplies in kit form. In this case, not only was Walters not destroyed as a potential competitor of Morton's, but it survived and prospered as a manufacturer and seller of "Walters Buildings". Since the antitrust laws should not be used to provide treble damage remedies for private state suits masquerading as antitrust actions, *Copperweld Corp. v. Independence Tube Corp.*, 104 S.Ct. 2731, 2745 (1984) and Walters' aggregation claim is nothing more than an effort to achieve that result, it was properly rejected by the court below.

CONCLUSION

Walters' petition insinuates that the author of the Seventh Circuit's opinion is a foe of much or all of current antitrust law and that he managed to impose his views on the panel. This Court will note, of course, that the decision upholding summary judgment for Morton was affirmed by vote of the entire panel and that one judge wrote a separate concurrence which used even stronger language to condemn the tying and resale price fixing claims. The concurrence does not question the grounds upon which the decision rests, but simply points out that there are *dicta* in the opinion which are of peripheral relevance to the matters raised in that court.

Walters' petition at best constitutes a quarrel with certain of the *dicta* in the Seventh Circuit's opinion but those *dicta* are not appropriate topics for Supreme Court review. The decision itself rests upon correct legal grounds and reflects a regard for applicable Supreme Court precedent. Accordingly, Morton respectfully requests that Walters' petition for a writ of certiorari be denied.

Respectfully submitted this 15th day of October, 1984.

RICKARD T. O'NEIL
Counsel of Record
SUSAN R. ROBERTSON
MICHAEL, BEST & FRIEDRICH
250 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
(414) 271-6560

MYRON L. CAUBLE, JR.
5415 North Idlewild Avenue
Milwaukee, Wisconsin 53217
(414) 332-9542
Attorneys for Respondent
Morton Buildings, Inc.

APPENDIX A

TABLE OF CONTENTS TO APPENDIX A

PAGE

Amended Complaint, R. 36 ..... A-1

United States District Court for the Eastern District of Wisconsin

JACK WALTERS & SONS. CORP., *Plaintiff,* -vs- MORTON BUILDINGS, INC., *Defendant.*	Amended Complaint Civil Action No. 78-C-329

Plaintiff, Jack Walters & Sons, Corp. ("Walters"), by its attorneys, David E. Beckwith, John S. Skilton, Michael G. Laskis and Michael A. Bowen, for its amended complaint against the defendant, alleges and shows as follows:

THE PARTIES

1. Walters is a Wisconsin corporation with its principal office in Allenton, Wisconsin. Since approximately 1962, Walters has been engaged in the business of selling farm and commercial buildings. Throughout said period up until approximately January 9, 1978, Walters operated as a dealer of buildings assembled with materials, parts and components sold to it by Morton Buildings, Inc. ("Morton"), the defendant herein.

2. Upon information and belief, Morton is an Illinois corporation with its principal place of business located at 252 West Adams Street, Morton, Illinois 61550. Morton is engaged in the business of selling and erecting farm, commercial and industrial buildings in at least 18 states, including Illinois, Wisconsin, Ohio, Michigan, Iowa, Minnesota, Kentucky, Indiana, Nebraska, North Dakota, South Dakota, New York, Pennsylvania, Colorado, Kansas, Missouri, Texas and Oklahoma. In addition to at least 70 other locations, Morton owns

and operates sales offices located in Dodgeville, Wisconsin and Elkhorn, Wisconsin, and, through these offices sells directly in southern Wisconsin. Morton is engaged in substantial and not isolated business activities in the State of Wisconsin.

JURISDICTION AND VENUE

3. This action is instituted, the amended complaint herein is filed and jurisdiction of this Court is invoked under and pursuant to Sections 4 and 16 of the Clayton Act (15 U.S.C. Sections 15 and 26) to recover threefold the damages sustained by plaintiff for injury to its business and property by reason of the defendant's violations of Section 1 of the Sherman Act (15 U.S.C. Section 1) and Section 3 of the Clayton Antitrust Act (15 U.S.C. Section 14). Plaintiff also requests injunctive relief against defendant's continuing violations of the Antitrust Laws, and to recover its cost of suit, including reasonable attorneys' fees. Plaintiff also seeks injunctive relief from plaintiff's intent to wrongfully terminate plaintiff's dealership under Section 16 of the Clayton Act and Chapter 135, Wis. Stats. (the "Wisconsin Fair Dealership Law").

4. This Court has jurisdiction of the subject matter of this action under Section 1337 of Title 28 of the United States Code because this action arises under acts of Congress regulating commerce and protecting trade and commerce against restraints and monopolies, under Section 1332(a) of Title 28 of the United States Code because this action is between citizens of different states and because the amount in dispute exceeds the sum of $10,000 exclusive of interest and costs, and pursuant to principles of pendent jurisdiction.

5. This Court has jurisdiction over the person of the defendant because the action arises from acts of the defendant within this district and the defendant is doing business and may be found in this district.

6. This action is properly venued in this Court because the claims asserted by plaintiff arose in the Eastern District of Wisconsin and the defendant is found and transacts business within the Eastern District of Wisconsin.

BACKGROUND ALLEGATIONS

7. Since at least 1960, Morton has marketed and sold, under the Morton name, trademarks and logos, materials, parts and components which are assembled as complete buildings for farm, commercial and industrial use ("Morton buildings"). The ultimate purchasers of said buildings are usually farmers; said buildings are normally used, *e.g.*, for storage or animal shelter.

8. A typical Morton building is a basic clear span pole building with steel siding and roof. Morton buildings range in size from a basic 14×21 building to buildings of up to 81 feet in width, clear span, with lengths of up to 500 feet. Materials, parts and components include treated wood posts or poles, dry cement, dimension lumber (*i.e.*, "nailers" (common 2×6 boards), "purlins" (common 2×4 boards), and "splash boards" (treated 2×8 boards)), common nails, hardware, steel sheets (for siding and roofing), roof trusses, insulation, window frames, windows, door tracks, and doors, and such other accessories as the customer may order. Morton Buildings, while they are not unique, and, upon information and belief, have no patented or other other legally protected unique characteristics, do have market acceptance by reason of advertising, marketing, and the quality of the materials used and of their erection and construction.

9. Since at least 1962, Morton has not only marketed and sold its buildings by and through its own sales offices, but has also sold to independent dealers for resale. In approximately 1962, Walters became such an authorized independent dealer

of Morton buildings and has remained as such to this date. On or about June 1, 1974, there were five authorized independent dealers of Morton buildings: Walters, Chandler Company, Morton Buildings of Michigan, Inc., Daugherty Sales and Service, and Morton Midstates Builders.

10. Since 1962, and particularly, during the period of June 1, 1974 to date, Morton has become and now is the most successful seller in the United States of buildings of the type described in paragraph 8. Concomitantly, the Morton name has become the dominant name in the industry. Upon information and belief, as of this date there are four major competitors in the sale of farm buildings of said type, the combined sales of which do not equal the sales of Morton alone. Upon information and belief, in 1974 Morton's gross sales of said buildings exceeded $80 million.

11. Since 1962, and, particularly, since 1974, the Morton name, trademarks and logos have acquired substantial goodwill and trade value, particularly in reference to the kind of buildings described in paragraph 8. Such value was obtained as the result of the high quality and good performance of Morton buildings, and by and through the successful selling and marketing efforts of Morton and its independent dealers.

12. The business of Walters as a Morton dealer consists of selling Morton buildings to farmers and other customers, and then purchasing from Morton all of the materials and components required to construct the building. Among the materials purchased are such basic commodities as lumber, nails, insulation and sheet metal. Certain of the components purchased from Morton have been designed by Morton and are fabricated by Morton from commonly available materials. All of the items which Walters purchases from Morton could, with no difficulty, be specified so that Walters could purchase items of identical quality and characteristics from local or other wholesale sources at prices substantially less than those charged

by Morton. Those components which Morton does fabricate, Walters could as well fabricate from readily available materials which could be specified by Morton with no depreciation in the quality of the fabricated components. Walters' business also involves ordering all of the components required for a customer's building from Morton and then, with its crews, erecting the customer's building on its premises from the components in accordance with directions and instructions which Morton has conveyed to Walters over the years. Because of its extensive experience in the sale and erection of Morton buildings, Walters at this time is fully qualified to erect such buildings without special assistance or direction from Morton.

13. Since 1962, and, particularly, since 1974, the Morton name, trademarks and logos have acquired substantial value in the State of Wisconsin, particularly in reference to the kind of buildings described in paragraph 8. Such value has been established in large part by and through the selling, marketing, construction, design and service efforts of Walters. As a result, the right to use the Morton name, trademarks and logos is now, and has been since 1974 and before, an important and valuable asset of Walters.

14. Prior to 1974, Walters operated profitably as a Morton dealer. For Walters' fiscal years 1974 and 1975 its gross sales of Morton buildings substantially exceeded $4 million; gross sales for the fiscal year 1976 exceeded $5 million; gross sales for the fiscal year 1977 exceeded $6 million. However, as the result of the unlawful actions of Morton herein complained of, Walters' profit on such sales since 1974 has been substantially reduced; indeed as the direct and proximate result of those actions, in the fiscal year 1977 Walters sustained a loss on such sales, even though they were the highest in its history.

FIRST CLAIM

(For Treble Damages Under The Antitrust Laws)

15. From the beginning of Walters' relationship with Morton, Morton has required Walters, as a condition of retaining its dealership and of maintaining its right to use the Morton name, trademarks and logos, to purchase all materials, parts and components of Morton buildings from Morton and Morton alone, even though such materials, parts and components generally were and are common items which could otherwise have been purchased and acquired by Walters at local lumber yards or other sources of supply at prices significantly less than those charged by Morton, and even though Morton itself did not manufacture or produce most of such items but rather purchased them from other sources of supply. Such common items included the treated wood posts or poles, dry cement, nailers, purlins, splash boards, nails, hardware, insulation, window frames, windows, door tracks and doors. In addition, Morton required Walters to purchase all trusses and steel sheets from Morton, and Morton alone, even though such components could be manufactured by Walters or others at prices substantially less than those charged by Morton.

16. From at least 1970 on, and continuing through this date, Walters has made repeated requests of Morton that Walters be permitted to purchase some or all of the materials, parts and components used in the buildings which it erected directly from sources of supply other than Morton. Such requests were made because of Walters' knowledge that the prices which it was being charged by Morton for such materials, parts and components were substantially higher than the prices which Walters could obtain from other sources for identical and/or fully interchangeable materials, parts and components. In each such instance, Morton denied such request; further, Morton threatened to terminate Walters' dealership, to discontinue doing business with Walters, and to raise prices on

other parts, and thus to prevent Walters from using the Morton name, trademarks and logos, should Walters seek to obtain or obtain any materials, parts or components from any source other than Morton. In addition, in order to enforce its unlawful policy, Morton policed the buying activities of Walters, *e.g.*, by causing its employees to inspect Walters' inventories and by requiring Walters to submit forms and to submit to various ordering procedures designed to detect and prevent purchases by Walters from any source of supply other than Morton. The aforesaid unlawful and coercive actions continued through the date of the original complaint herein and resulted in Walters' decisions to refrain from purchasing materials, parts and components from sources other than Morton.

17. Because the inflated prices charged by Morton from 1970 to date, Walters made efforts to acquire the common materials, parts and/or components directly from Morton's own suppliers. In particular, Walters sought to acquire materials, parts and components not unique to Morton such as insulation from Celotex Corp.; overhead doors from Frantz Manufacturing Co.; windows from Luedtke Mfg. & Dist. Co., Inc.; poles from Kopper's Co.; doors from Ceco Corporation; door tracks from National Mfg. Co.; nails from Maze Nails; ventilation equipment from Aerovent Corporation; and pest controls from Rid-a-Bird Corporation. Some of such contracts occurred between the dates of June 1, 1974 and the date of the original complaint herein. In each instance, respectively, Morton's supplier refused to deal with Walters, because, upon information and belief, Morton had informed it (the supplier) that should it do business with Walters (or any other dealer), Morton would not do business with it (the supplier). As a result of such unlawful refusals to deal, conspiracies and boycotts, Walters was unable to obtain any of the aforesaid items from any of Morton's suppliers, respectively.

18. From the beginning of its relationship with Morton, and, particularly, from June 1, 1974 through the date of the original complaint herein, Morton imposed territorial restrictions on the selling activities of Walters. In this regard, Morton, by threats, intimidation, and policing activities, sought to prevent and prevented Walters from selling in any area outside of its assigned territory despite Walters' repeated requests to sell in other areas, including, without limitation, throughout the State of Wisconsin, and in areas of Iowa, Minnesota and upper Michigan. As a result of said unlawful restrictions, Walters was prevented from making substantial sales of Morton buildings outside of its assigned territories.

18(a). From at least June 1, 1974 through June 1, 1978, Morton enforced and imposed various coercive policies, requirements and restrictions upon Walters (and other independent dealers) with the purpose and effect of eliminating or reducing intrabrand competition between independent dealers such as Walters and Morton in the sale of Morton buildings and of controlling and maintaining the retail sales price charged by Walters (and other independent dealers) for Morton buildings. Such policies, requirements and restrictions included the following:

(a) directly controlling and setting the retail price of the majority of buildings sold by Walters by advertising the retail sales price for Morton buildings ("advertised specials") within the territory in which Walters was permitted to sell its buildings;

(b) enforcing territorial restrictions and restraints upon Walters (and other independent dealers), reducing the territory in which Walters was permitted to sell, and preventing Walters from acquiring additional territory in order to prevent Walters from competing with Morton's own sales outlets; and

(c) increasing the cost to Walters of materials, parts and components while simultaneously imposing policies and requirements that prevented Walters (and other inde-

pendent dealers) from purchasing materials, parts and components from any source other than Morton, thus requiring Walters and other dealers to charge the customer an unnecessarily high and artificially inflated price.

19. Since 1970, Morton, either because it wished to eliminate its dealers and sell directly but did not wish to pay full value for the dealers' businesses, or in order to enforce its anticompetitive practices and restraints of trade:

(a) increased the cost of the materials, parts and components of its buildings to its dealers, including Walters (and to its sales outlets) for the stated purpose of "maximizing" factory profitability but, upon information and belief, for the real purpose of making it unprofitable to operate as an independent Morton dealer;

(b) continued to enforce its policy that no dealer, including Walters, purchase any materials, parts or components, from any source other than Morton; and

(c) arbitrarily charged dealers, including Walters, for portions of Morton's administrative costs and expenses even though such dealers did not benefit in any way from the services covered by such charges, and, indeed were providing such services for their own operations at their own expense.

Upon information and belief, as the result of the aforesaid acts and practices Morton substantially reduced the profit margins of independent dealers, including Walters, resulting by 1977 in the elimination of every independent dealer except Walters. Upon information and belief, each of the other dealers was driven out of the business because of the afore-described unlawful activities of Morton, and was forced to sell its business to Morton at a disadvantageous price.

20. The afore-described policies, activities, conspiratorial conduct, agreements, understandings, and actions of Morton, separately and in combination, constitute an unreasonable and unlawful restraint of trade and commerce in and among the

several states, and have substantially reduced, and continue to substantially reduce, competition in a not insignificant and not insubstantial manner and amount, and have resulted in injury to the public, as well as to the business of Walters.

21. The afore-described policies, activities, conspiratorial conduct, agreements, understandings and actions of Morton, separately and in combination, violated the Antitrust Laws of the United States, and, in particular, Section 1 of the Sherman Act and Section 3 of the Clayton Act.

22. As a result of the aforesaid violations, Walters, from June 1, 1974 through the date of this complaint, has sustained injuries and damages to its business and property in an amount of at least Two Million Seven Hundred Fifty Thousand Dollars ($2,750,000.00).

SECOND CLAIM

(For Damages For Termination Violation of the Wisconsin Fair Dealership Law)

As and for its second claim against the defendant, plaintiff alleges and shows as follows:

23. Repeats and realleges, as though fully set forth herein, each and every allegation of paragraphs 1-22, above.

24. Since at least June 1, 1974, Walters has been a "dealer" in Morton buildings within the meaning of Section 135.02(5), Wis. Stats.

25. Since at least June 1, 1974, Morton has been a "grantor" within the meaning of Section 135.02(3), Wis. Stats.

26. Since at least June 1, 1974, there has been a "dealership" agreement between Morton and Walters within the meaning of Section 135.02(2), Wis. Stats.

27. On October 14, 1977, authorized representatives of Morton and Walters met to discuss the adverse effects of

Morton's unlawful policies, activities, conspiratorial conduct, agreements, understandings and actions on the business of Walters. At such time, Walters again requested Morton to reduce the price of materials, parts and components, and/or to permit Walters to obtain such materials, parts and/or components from other sources. Once again Morton refused such requests and threatened Walters with termination should it seek and obtain such other sources of supply.

28. After said October 14, 1977 meeting Walters was put to the choice of seeking other sources of supply for materials, parts and/or components of its buildings or going out of business. Walters chose to stay in business by locating and developing other sources of supply. By letter dated January 9, 1977, attached hereto as Exhibit A, Walters informed Morton of this decision.

29. By letter dated February 17, 1978, a copy of which is attached hereto as Exhibit B, Morton informed Walters that "as of June 1, 1978, Morton Buildings, Inc., is terminating its dealership arrangement with Jack Walters and Sons, Corp." Said letter does not comply with the requirements of Section 135.04, Wis. Stats., and, accordingly, does not constitute a lawful or proper notice of termination.

30. Walters' dealership was terminated by Morton. Morton lacked "good cause" within the meaning of Section 135.03, Wis. Stats., for termination of Walters. Upon information and belief, Morton's "cause" for terminating Walters was grounded in continuing efforts to violate the Antitrust Laws to the injury of Walters, as more fully alleged in plaintiff's First Claim.

31. Said termination followed and was indirectly accomplished by and through Morton's imposition and enforcement of the aforedescribed policies, requirements, restrictions, agreements and understandings, separately and in combination, which had severely damaged and ultimately destroyed Walters' ability to operate profitably as a Morton dealer, which had

rendered Walters' Morton dealership valueless, and which had forced Walters to commence selling its own line of buildings.

32. Morton's termination of Walters' dealership was in violation of the Wisconsin Fair Dealership Law.

33. By reason of the aforesaid violations, Walters has been damaged in an amount which has not yet been fully determined, but which is capable of ascertainment to a reasonable degree of legal certainty, and which includes the start-up and additional marketing and advertising costs which Walters has been forced to incur in order to maintain itself in business after Morton's unlawful termination of its dealership.

THIRD CLAIM

(For Treble Damages For Termination in Violation of Section 1 of the Sherman Act and Section 3 of the Clayton Act)

34. Repeats and realleges, as though fully set forth herein, each and every allegation of paragraphs 1-22, 27-31 and 33 above.

35. Morton's termination of Walters' dealership was in violation of Section 1 of the Sherman Antitrust Act, and Section 3 of the Clayton Antitrust Act.

FOURTH CLAIM

36. Repeats and realleges as though fully set forth herein, each and every allegation set forth in paragraphs 1-22 and 27-29, above.

37. During the period from at least June 1, 1974 to February 17, 1978, Morton, by virtue of the contractual and in fact dealership relationship which existed between itself and Walters, through which relationship Morton required Walters, as an exclusive Morton dealer, *inter alia,* to use its best efforts to

promote and sell and erect Morton buildings, and also the public policy of the State of Wisconsin, *e.g.,* as declared in the Wisconsin Fair Dealership Law, owed Walters a duty of good faith and fair dealing which duty included the duty to permit Walters a fair opportunity to make a reasonable profit and return on its own sales of Morton buildings. Throughout said period, Morton possessed and exercised a dominant economic power and position over Walters which Morton obtained and maintained by and through its ownership of and control over its name, trademark and logo, in combination with Walters' known and expressed desire to retain its Morton dealership and its right to use the Morton name, trademarks and logos which Walters had promoted and developed in the State of Wisconsin since approximately 1962.

38. Throughout said period Walters in good faith exercised its best efforts to promote, sell and erect Morton buildings as a Morton dealer.

39. From at least June 1, 1974, and thereafter, Morton misused and abused its dominant economic power and position over Walters, and breached its duty of good faith and fair dealing to Walters, by:

(a) charging unfair, unreasonable and exorbitant prices for materials, parts and components;

(b) requiring and coercing Walters to purchase all materials, parts and components from it;

(c) reducing the discounts available to, and thus the profit margin available to, Walters on purchases of materials, parts and components;

(d) preventing Walters from selling Morton buildings outside of its designated territory;

(e) reducing the territory in which Walters was permitted to sell Morton buildings; and

(f) preventing Walters from acquiring additional territory.

40. Upon information and belief, the purpose and intent, as well as the effect and result, of the scheme alleged in paragraph 39, and each and every constituent part, was not only to restrain trade and prevent Walters from competing with Morton's own sales offices, but also to limit and ultimately to destroy the profitability of Walters' dealership and thus to terminate Walters' dealership and concomitantly to eliminate Walters as a potential or future competitor of Morton.

41. The scheme alleged in paragraph 39, including its constituent acts, policies, practices, predatory conduct and changes in competitive circumstances was oppressive, was undertaken in a disguised, secretive and deceitful fashion in order to conceal its purposes and effects from Walters, and violated Morton's duty of good faith and fair dealing to Walters, as well as Section 1 of the Sherman Act and Section 3 of the Clayton Act and the Wisconsin Fair Dealership Law.

42. The scheme alleged in paragraph 39, separately and in combination, intentionally, unfairly, unjustifiably, inequitably and unlawfully: (a) overcharged Walters for common materials, parts and components; (b) thwarted and restricted Walters' ability to operate profitably; (c) confiscated and converted to Morton Walters' just share of profits and returns on its sales of Morton buildings; (d) confiscated and ultimately destroyed the value of Walters' Morton dealership; and (e) forced Walters to commence selling its own line of buildings.

43. As the result of the aforesaid scheme, violations, breaches of duty, unfair, predatory and unlawful conduct, acts, practices and changes, as above alleged, Walters sustained injuries and damages to its business and property in an amount of at least Two Million Seven Hundred and Fifty Thousand Dollars ($2,750,000.00).

44. Upon information and belief, the aforesaid scheme, and its constituent acts, policies, practices, predatory conduct and changes in competitive circumstances, was undertaken in

bad faith, wilfully, wantonly and maliciously, and accordingly plaintiff is entitled to punitive damages in such amount as the trier of fact may assess.

FIFTH CLAIM

45. Repeats and realleges, as though fully set forth herein, each and every allegation set forth in paragraphs 1-22, 27-29 and 37-39, above.

46. Since on or about February 17, 1978, defendant Morton Buildings, Inc. has unfairly competed with Walters. Overt acts of unfair competition have included, but have not been limited to, contact, solicitation and hiring of key, trained employees of Walters for Morton's Wisconsin sales offices. In this regard, Morton has contacted Walters' employees on numerous occasions, has offered such employees pay and benefits higher than those provided by Morton to its employees generally, and has falsely disparaged the financial standing, condition and prospects of Walters.

47. As a result of the unlawful and unfair conduct described in paragraph 46, Morton has succeeded in hiring several of Walters' employees.

48. The aforesaid conduct has been deliberately directed at Walters as distinct from other competitors of Morton. Upon information and belief, Morton has engaged in the aforesaid conduct for the purpose of limiting and ultimately destroying Walters' ability to compete with Morton in the market. Upon information and belief, the aforesaid conduct was motivated in material part by ill-will and malice toward Walters and as part of Morton's intent and continuing efforts to destroy Walters as a competitor of Morton.

49. As a result of the aforesaid conduct, Walters has been injured in an amount which has not yet been fully determined.

but which is capable of ascertainment to a reasonable degree of legal certainty.

50. If the aforesaid acts or acts similar in kind, are not ceased, restrained or enjoined, Walters will suffer irreparable injury and harm.

WHEREFORE, Walters prays for judgment against defendant as follows:

1. Declaring that the above-alleged policies, activities, conduct, agreements, understandings and actions of Morton are unlawful and in violation of Section 1 of the Sherman Antitrust Act and Section 3 of the Clayton Antitrust Act.

2. Awarding judgment to Walters and against Morton for an amount equal to threefold the damages sustained by plaintiff as a result of defendant's violations of Section 1 of the Sherman Antitrust Act and Section 3 of the Clayton Antitrust Act, as alleged in the First and Third Claims.

3. Awarding judgment to Walters and against Morton for the damages sustained by Walters as the result of Morton's unlawful termination of plaintiff's dealership as alleged in the Second Claim.

4. Awarding judgment to Walters and against Morton for the damages sustained by Walters as the result of the acts, policies, practices, predatory conduct and changes in competitive circumstances alleged in the Fourth Claim, as well as punitive damages.

5. Awarding judgment to Walters and against Morton for the damages sustained by Walters as the result of Morton's unfair and unlawful conduct as alleged in the Fifth Claim and permanently enjoining Morton from any such further conduct.

6. Awarding judgment to Walters and against Morton for Walters' costs of suit, including reasonable attorneys' fees.

DAVID E. BECKWITH
JOHN S. SKILTON
MICHAEL G. LASKIS
MICHAEL A. BOWEN

By_____
Attorneys for Plaintiff
Jack Walters & Sons, Corp.

Of Counsel:

FOLEY & LARDNER
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
414-271-2400

PLAINTIFF HEREBY REASSERTS
ITS DEMAND FOR TRIAL BY JURY